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No. 12,171

IN THE

United States Court of Appeals
For the Ninth Circuit

HILLIARD SANDERS,

Appellant,

vs.

EDWIN B. SWOPE, Warden, United
States Penitentiary, Alcatraz, Cali-
fornia,

Appellee.

BRIEF FOR APPELLEE.

FRANK J. HENNESSY,
United States Attorney,

JOSEPH KARESH,

Assistant United States Attorney,
422 Post Office Building, San Francisco 1, California,

Attorneys for Appellee.

FILED

APR 19 1949

PAUL H. O'BRIEN

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No. 12,171

IN THE
United States Court of Appeals
For the Ninth Circuit

HILLIARD SANDERS,

Appellant,

VS.

EDWIN B. SWOPE, Warden, United
States Penitentiary, Alcatraz, Cali-
fornia,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

The method by which appellant, an inmate of the United States Penitentiary at Alcatraz, California, seeks to invoke the jurisdiction of the United States District Court for the Northern District of California, hereinafter called "the court below", and the jurisdiction of this Honorable Court to review the decision of the Court below dismissing appellant's complaint for a temporary restraining order directed against the appellee, the warden of said penitentiary, is set forth in the said appellant's jurisdictional statement on page 1 of his opening brief.

STATEMENT OF THE CASE.

Appellant, an inmate of the United States Penitentiary at Alcatraz, Island, California, filed a complaint for a temporary restraining order to prevent the appellee, the warden of said penitentiary, from interfering with the mailing of a certain letter to an attorney Albert A. Spiegel, of San Francisco, California (Tr. 1-5), and the Court below issued an order to show cause. (Tr. 6.) The appellee filed a motion to dismiss on the ground that the said complaint failed to state a cause of action (Tr. 7), together with a memorandum of points and authorities in support of the said motion. (Tr. 8-10.) Thereafter the appellant filed a pleading which he entitled "Opposition to Motion to Dismiss" (Tr. 11), and a memorandum in support thereof. (Tr. 12-15.) The appellant likewise filed a motion for a writ of *habeas corpus ad testificandum* to compel his presence before the Court below for the purpose of personally pleading his cause (Tr. 16-17), which motion was not granted. Thereafter the Court below entered the following "Order Granting Motion to Dismiss Complaint":

"Since plaintiff's complaint for a temporary restraining order concerns a matter that involves an exercise of discretion on the part of prison officials, said complaint fails to state a claim upon which relief can be granted. See 18 U.S.C.A. 4042; *Snow v. Roche*, 154 F. 2d 718; *Numer v. Miller*, 165 F. 2d 986; *DeCloux v. Johnston*, 70 F. Supp. 718. It is therefore

"ORDERED that defendant's motion to dismiss the complaint be and the same is hereby GRANTED

and said complaint is hereby DISMISSED and the order to show cause heretofore issued DISCHARGED.

“Dated: December 27, 1948.

MICHAEL J. ROCHE

United States District Judge.

(Endorsed)

Filed: Dec. 27, 1948.

C. W. Calbreath, Clerk.”¹

(Tr. 18.)

From this order appellant now appeals to this Honorable Court. (Tr. 22.)

QUESTION.

Did the Court below have the power to order the warden of the United States Penitentiary at Alcatraz, California, to transmit the letter in question?²

¹The case of *Snow v. Roche* which has been inadvertently cited in the aforementioned order as appearing in 154 F. 2d at page 718, is actually reported in 143 F. 2d at page 718.

²“Alcatraz, California
October 16, 1948

Albert A. Spiegel, Esq.,
1655 Polk Street
San Francisco, California
Dear Mr. Spiegel:

With a view to soliciting your service, I should like very much for you to make arrangement to visit me relative to pending and anticipated legal matters.

In view of the personal animus of the director of the United States Bureau of Prisons and the fact that I have an attorney of record, Mr. James J. Laughlin, National Press Building, Washington, D. C., you might find it expedient to contact Mr. Laughlin and ask him, in my behalf to authorize you to visit me.

The Federal Gestapo has effectively surpressed my efforts to communicate with counsel in the past, (see *Sanders v. Johnston* 159 F (2d) 74), therefore, I seriously doubt you will receive this

CONTENTION OF APPELLEE.

The answer to the above stated question is: No.

ARGUMENT.

It appears from the complaint filed by the appellant that the relief which he seeks therein involves an exercise of discretion of the appellee, the warden of the United States Penitentiary at Alcatraz Island, California under rules promulgated for the governance of inmates of penal institutions, in accordance with the provisions of Title 18 U.S.C.A. Section 4042.³ It

letter. If you do, I should like for you to make a note of the date received.

Sincerely yours,

HILLIARD SANDERS PMB 668
United States Penitentiary
Alcatraz, California

(Endorsed) FILED: Oct. 26, 1948.

C. W. CALBREATH, Clerk."

Exhibit "A", Appellant's Complaint for Temporary Restraining Order. (Tr. 5.)

³"§4042. *Duties of Bureau of Prisons.*

The Bureau of Prisons, under the direction of the Attorney General, shall—

(1) have charge of the management and regulation of all Federal penal and correctional institutions;

(2) provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise;

(3) provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States.

This section shall not apply to military or naval penal or correctional institutions or the persons confined therein."

Title 18 U.S.C.A., Section 4042.

The above quoted code section supplanted, as of September 1, 1948, Title 18 U.S.C.A., Section 753a, which read in pertinent part as follows:

"The Bureau of Prisons shall have charge of the management and regulation of all Federal penal and correctional institutions

was on this ground that the Court below dismissed appellant's complaint, and in entering this order the Court below cited as authority the following cases which appellee herein also adopts to support this proposition which he too likewise advances.

Snow v. Roche, (C.C.A. 9), 143 F. (2d) 718, certiorari denied, 323 U. S. 788;

Numer v. Miller, (C.C.A. 9), 165 F. (2d) 986;

DeCloux v. Johnston, (D.C.N.C.), 70 F. Supp. 718.

Furthermore, it is well settled that it is not the function of the Courts to superintend the treatment and discipline of prisoners in penitentiaries, but only to deliver from imprisonment those who are illegally confined.

Platek v. Aderhold, (C.C.A. 5), 73 F. (2d) 173, 175;

Kelly v. Dowd, (C.C.A. 7), 140 F. (2d) 81, 83.

Certiorari denied, 320 U. S. 786.

Sarshik v. Sanford, (C.C.A. 5), 142 F. (2d) 676.

See also:

In re Terrill, 144 F. 616;

Crites v. Hill, 9 F. Supp. 975;

Hauck v. Hiatt, 50 F. Supp. 917.

Appellee now calls to the attention of this Honorable Court its decision in *Sanders v. Johnston*, 159 F. (2d) 74. In this case appellant, who is the same person as

and be responsible for the safe-keeping, care, protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States * * *

the appellant in our case at bar, had unsuccessfully sought in the District Court to enjoin the warden from interfering with his use of the mails to write his attorney in the District of Columbia. On appeal the warden insisted that the judgment of the Court below should be affirmed on the ground that the action of the warden constituted an exercise of administrative discretion with which the Courts had no authority to interfere. This Honorable Court, however, sustained the decision of the District Court (Judge Denman dissenting), without inquiring into what authority, if any, the lower Court had in the premises. In this connection we quote from this decision at page 75:

“We need not inquire what if any authority the courts have in the premises. The complaint was properly dismissed for failure to state facts sufficient to entitle appellant to relief. The contents of the letters may have involved a gross breach of prison discipline—may, indeed, have been wholly unrelated to the cases in which Laughlin was acting as appellant’s counsel; and in the absence of allegations showing the contrary we are obliged to assume that such was the case. *Laughlin v. Cummings*, 70 App. D. C. 192, 105 F. 2d 71.”

The reading of the foregoing language indicates that if a letter involves a “gross breach of prison discipline,” that the warden is within his rights in not mailing the same. Certainly the letter in our case at bar, which refers to federal officials as the “Federal Gestapo”, does involve a “gross breach of prison discipline.” Its contents are scurrilous, defamatory, and contumacious. Furthermore in this decision this Court

seemed to hold that the letter must be written to one who is actually the inmate's counsel, which is not the case here, since appellant in the letter in question states that his attorney is a Mr. James J. Laughlin of Washington, D. C. In addition, the letter in question fails to indicate the nature of the litigation which he desires to institute, which also seems to be a requirement laid down by this court in *Sanders v. Johnston*, supra. Even Judge Denman in his dissent, by suggesting that the inmate should be permitted to amend his petition so as to divulge the contents of the letter that he seeks to mail to his attorney, seemed to likewise hold that if a letter involves a "gross breach of prison discipline", that it is properly subject to restriction from the mails.

In this connection, we quote the language of this Honorable Court in *Numer v. Miller*, supra, at page 987:

"As to the asserted violation of constitutional guaranties, we may add that a prisoner who persists in abusing a privilege or opportunity extended to all prison inmates is in no position to complain of unequal treatment if the privilege is taken away from him."

SUMMARY.

The appellant has failed to state a cause of action. The action of the court below can properly be sustained on the ground that the letter in question, being scurrilous, defamatory, and contumacious, involved a

“gross breach of prison discipline.” The appellee, however, respectfully urges this court to affirm the order of the court below on the ground stated by the court below, that “since plaintiff’s complaint for a temporary restraining order concerns a matter that involves an exercise of discipline on the part of prison officials, said complaint fails to state a claim upon which relief can be granted.” Appellee makes this request so that this Honorable Court by its decision may in the future discourage useless and burdensome litigation.

CONCLUSION.

In view of the foregoing, it is respectfully urged that the order of the court below is correct and should be affirmed.

Dated, San Francisco, California,
April 18, 1949.

FRANK J. HENNESSY,
United States Attorney,

JOSEPH KARESH,
Assistant United States Attorney,
Attorneys for Appellee.

No. 12172

United States
Court of Appeals
For the Ninth Circuit.

ALLIED LUMBER COMPANY,

Appellant,

vs.

THE CLEVELAND LUMBER AND DOOR
COMPANY,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California
Central Division

FILED
AUG 26 1948

PAUL P. O'BRIEN,
CLERK

No. 12172

United States
Court of Appeals
For the Ninth Circuit.

ALLIED LUMBER COMPANY,

Appellant,

vs.

THE CLEVELAND LUMBER AND DOOR
COMPANY,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
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Central Division

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

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San Francisco 4, Calif.

For Appellee The Cleveland Lumber and Door
Company:

NEWLIN, HOLLEY, SANDMEYER &
TACKABURY,

1020 Edison Bldg.,
Los Angeles 13, Calif.

For Appellee Cecil L. Bandy etc.:

LLOYD J. SEAY,

311 S Vermont Ave.,
Los Angeles 5, Calif. [1*]

* Page numbering appearing at bottom of page of original certified Transcript of Record.

In the District Court of the United States for the
Southern District of California, Central Division

Civil Action No. 8058-PH

THE CLEVELAND LUMBER AND DOOR
COMPANY,

Plaintiff,

vs.

ALLIED LUMBER COMPANY; CECIL L.
BANDY; and CECIL L. BANDY doing business under the fictitious firm name and style of
PIONEER LUMBER COMPANY,

Defendants.

AMENDED COMPLAINT FOR RESCISSION
AND FOR MONEY HAD AND RECEIVED

Plaintiff above named complains of the above-named defendants as follows:

I.

Plaintiff is a corporation incorporated under the laws of the State of Ohio; defendant Allied Lumber Company is a corporation incorporated under the laws of the State of California; defendant Cecil L. Bandy and Cecil L. Bandy, doing business under the fictitious firm name and style of Pioneer Lumber Company, is a citizen of the State of California and a resident of the County of Los Angeles, State of California. The matter in controversy [2] ex-

ceeds, exclusive of interest and costs of suit, the sum of \$3,000.00

II.

That on or about the 14th day of October, 1947, plaintiff and defendants entered into a written agreement whereby in consideration of the payment to them of \$16,808.05 defendants agreed to supply plaintiff with two carloads of certain lumber, to wit: $\frac{5}{8}$ inch x 8 inch, A and better, thoroughly air dried redwood bevel siding; that by the terms of said agreement defendants warranted to plaintiff, among other things, that said lumber would be thoroughly air dried and would be in strict accordance with the rules of the California Redwood Association.

That the rules of the California Redwood Association provide that said lumber shall weigh not more than 800 pounds per thousand surface feet.

III.

That prior to inspection of said lumber plaintiff paid defendants said sum of \$16,808.05; that said lumber was delivered to plaintiff on or about the 10th day of December, 1947, and that thereafter plaintiff examined and inspected said lumber; that said lumber was not in accordance with the terms and warranties set forth in the agreement hereinabove mentioned in Paragraph II hereof in that among other things said lumber was not thoroughly air dried and weighed more than 800 pounds per thousand surface feet, to wit, approximately 1400 pounds per thousand surface feet.

IV.

That on or about December 15, 1947, by reason of the facts hereinabove alleged plaintiff rescinded said agreement and made demand upon defendants for return of the sum of \$16,808.05 to plaintiff and tendered to defendants said lumber.

V.

That defendants failed and refused and still fail and [3] refused to return to plaintiff said sum of \$16,808.05.

VI.

That in addition to said sum of \$16,808.05 paid defendants by plaintiff, plaintiff has been required to expend certain sums in connection with said lumber for unloading, piling, reloading, demurrage, and telephone and telegraph expenses in the sum of \$480.00. That plaintiff has made demand upon defendants for all of said sums and that defendants have failed and refused and still fail and refuse to pay any of said sums to plaintiff.

VII.

That by reason of defendants' acts as hereinabove alleged plaintiff has been damaged in the total sum of \$17,288.05, as follows:

Invoice for lumber paid	\$16,808.05
Unloading and piling	200.00
Reloading	180.00
Demurrage	70.00
Telephone and telegrams from plaintiff to defendants	30.00

For a Second and Separate Claim Plaintiff Alleges:

I.

Plaintiff here incorporates and realleges the allegations contained in Paragraph I of plaintiff's first claim herein, with the same force and effect as though repeated at this point in full.

II.

Defendants owe plaintiff \$17,288.05 for money had and received from plaintiff on or about the 1st day of December, 1947, to be paid by defendants to plaintiff. [4]

Wherefore, plaintiff prays judgment against defendants in the sum of \$17,288.05; for its costs of suit herein incurred and for such other relief as may be proper in the premises.

NEWLIN, HOLLEY, SAND-
MEYER & TACKABURY,

By /s/ FRANK R. JOHNSTON,
Attorneys for Plaintiff.

[Endorsed]: Filed April 13, 1948. [5]

[Title of District Court and Cause.]

Civil Action No. 8058-PH

ANSWER OF CECIL L. BANDY, AND CECIL
L. BANDY, DOING BUSINESS UNDER
THE FICTITIOUS FIRM NAME AND
STYLE OF PIONEER LUMBER COM-
PANY

Comes Now the defendant, Cecil L. Bandy, and Cecil L. Bandy, doing business under the fictitious firm name and style of Pioneer Lumber Company, and for his separate answer to the amended complaint filed herein, admits, denies, and alleges as follows:

I.

Answering paragraph II of said amended complaint, this answering defendant denies that it entered into a written agreement with plaintiff to supply plaintiff with two carloads of lumber, to wit: 5/8" x 8", A and better, thoroughly air dried redwood bevel siding, and denies further that said defendant warranted to plaintiff that said lumber would be thoroughly air dried and would be in strict accordance with the rules of the California Redwood Association, as therein alleged. [6]

II.

Answering paragraph III of said amended complaint, the defendant admits that plaintiff paid to defendant said sum of Sixteen Thousand Eight Hundred and Eight and 05/100 (\$16,808.05) Dollars as agent for co-defendant, Allied Lumber Company.

Except as hereinabove admitted, defendant denies each and every material allegation contained in said paragraph III, both specifically and generally.

III.

Answering paragraph IV of said amended complaint, the defendant denies that plaintiff rescinded said agreement and made demand upon this answering defendant for the return of the sum of Sixteen Thousand Eight Hundred and Eight and 05/100 (\$16,808.05) Dollars and tendered to said answering defendant said lumber, as therein alleged.

IV.

Answering paragraph VI of said amended complaint, this answering defendant denies each and every allegation contained therein, both specifically and generally, except that said defendant admits that it has refused^{*} and still refuses to pay any of said sum to plaintiff, as therein alleged.

V.

Answering paragraph VII of said amended complaint, defendant denies each and every allegation contained therein, both specifically and generally, except that defendant admits that it received the sum of Sixteen Thousand Eight Hundred and Eight and 05/100 (\$16,808.05) Dollars for said lumber as agent for the co-defendant, Allied Lumber Company.

VI.

Answering paragraphs I and II of plaintiff's Second and Separate Claim, this answering defend-

ant denies each and every material allegation contained therein, by reference or otherwise, [7] except as is hereinabove admitted, in answer to plaintiff's First Cause of Action.

As a Further Separate and Distinct Defense to Plaintiff's Causes of Action Set Forth in Said Amended Complaint, this answering defendant alleges:

I.

That on or about the 2nd day of October, 1947, this defendant was instructed to ship to plaintiff two carloads of 5/8" x 8" "A" and better grade, air dried bevel siding, plain edge pattern 326, California Redwood Association standard specifications to apply. That this defendant shipped two carloads of lumber to plaintiff, but that this answering defendant never, at any time, warranted the moisture content of said lumber, and never, at any time, warranted that said lumber would be thoroughly air dried and would be in strict accordance with the rules of the California Redwood Association. That at the time of filling said order for the Allied Lumber Company, the said Allied Lumber Company was thoroughly advised of the condition of said lumber, and said shipment of the lumber in its condition was made at the request and under conditions known to Allied Lumber Company. That during all times mentioned in said amended complaint, this answering defendant was acting as agent for the Allied Lumber Company.

This answering defendant further alleges that at

all times mentioned in said amended complaint, and up to February 19, 1948, plaintiff has retained said lumber, and still retains said lumber, and said lumber has been under the custody, control, and disposition of the plaintiff.

II.

This defendant further alleges that the subject matter and alleged causes of action sued upon herein are the same as that set up in a cause of action filed in the District Court of the United States for the Northern District of California, [8] Southern Division, being action # 278672, wherein the Allied Lumber Company is plaintiff, and Pioneer Lumber Company, Cleveland Lumber and Door Company, et al., are defendants. That said action is now pending in said court.

Wherefore, this defendant prays that plaintiff take nothing upon the amended complaint filed herein, and that he have and recover his costs herein expanded.

/s/ LLOYD J. SEAY,
Attorney for Cecil L. Bandy, and Cecil L. Bandy,
doing business under the fictitious firm name
and style of Pioneer Lumber Company.

Admitted as Defendant's (Allied) Exhibit H,
Oct. 20, 1948.

Affidavit of Service by mail attached.

[Endorsed]: Filed May 4, 1948. [9]

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Comes now Allied Lumber Company, one of the defendants above named, and answering complaint on file herein, admits, denies and alleges as follows:

Answering the first count or cause of action set forth in the said amended complaint, this defendant admits, denies and alleges as follows:

I.

Alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations contained in Paragraph I of the said first count or cause of action commencing with the word "defendant" on line 29, page 1 of the said complaint, and ending with the word "California" [11] on line 32, page 1, of the said complaint; admits the remaining allegations contained in the said paragraph.

II.

Denies generally and specifically the allegations contained in Paragraph II of the said complaint and in this connection alleges that within two years next last past, Cleveland Lumber and Door Co. ordered from this defendant lumber according to certain specifications; that this defendant, as broker, transmitted said order to the Pioneer Lumber Company; that the Pioneer Lumber Company agreed to complete said order and ship direct to defendant provided that defendant paid Pioneer Lumber Company the sum of \$16,808.05 on its sight draft, all

of which plaintiff consented to do. That thereupon Pioneer Lumber Company forwarded said lumber to plaintiff at Cleveland, Ohio, for which they received from plaintiff said sum of \$16,808.05 on said sight draft. That shortly after the arrival of said lumber at Cleveland, Ohio, plaintiff stated to Pioneer Lumber Company and this defendant that the same was not according to said specifications and that the plaintiff was drawing a sight draft on the Pioneer Lumber Company for the amount it paid Pioneer Lumber Company. That this defendant was informed and believes and therefore alleges that said sight draft was not paid nor was any sum paid plaintiff. Defendant was informed and believes and therefore alleges that the plaintiff has returned the said lumber to the Pioneer Lumber Company that said lumber is now under its control and custody.

III.

Denies that the plaintiff paid to this defendant any sum whatever at any time; alleges that with the exception of the said denial this defendant has no information or belief upon the subject sufficient to enable it to answer the [12] allegations contained in Paragraph III of the said first count or cause of action, and basing its denial on that ground, denies generally and specifically the said allegations.

IV. and V.

Admits that the plaintiff has demanded of this defendant the sum of \$16,808.05 and that this defendant has failed and refused to pay the same, or

any part thereof, and alleges that no sum whatever is due or owing from this defendant to the plaintiff; alleges that with the exception of the foregoing denial this defendant has no information or belief upon the subject sufficient to enable it to answer the allegations contained in Paragraph IV of the said first count or cause of action and basing its denial on that ground denies generally and specifically the said allegations.

VI.

Admits that the plaintiff has demanded from this defendant payment of the sums specified in Paragraph VI of the said first count or cause of action, and that this defendant has failed and refused to pay the same, or any part thereof, and alleges that no sum whatever is due or owing from this defendant to the plaintiff, and further alleges that with the exception of the foregoing denial this defendant has no information or belief upon the subject sufficient to enable it to answer the allegations contained in the said paragraph, and basing its denial on that ground, denies generally and specifically the said allegations.

VII.

Denies that the plaintiff has been damaged in any sum whatever by any act or acts of this defendant and alleges that with the exception of the foregoing denial this defendant has no information or belief upon the subject sufficient to [13] enable it to answer the allegations contained in Paragraph VII of the said cause of action, and basing its denial on

that ground, denies generally and specifically the said allegations.

As and for a separate second and independent defense to the said alleged first count or cause of action, this defendant alleges that there was at the commencement of this action and still is another action pending in the District Court of the United States for the Northern District of California, Southern Division, between the parties to the above-entitled action and for the same cause of action as that set forth in the first alleged count or cause of action contained in the said complaint on file in the above-entitled action, and which prior action between the same parties and for the same subject matter and the same cause of action is titled "Allied Lumber Company vs. Pioneer Lumber Company, Ross Matjasic, Cleveland Lumber and Door Co., a foreign corporation, Reserve Lumber Company, First Doe, Second Doe and Third Doe, Cecil Bandy" and numbered 27867R in the records of the said District Court of the United States for the Northern District of California, Southern Division, and that attached hereto, marked "Exhibit A" and by this reference made a part hereof, and incorporated herein with the same force and effect as if it were specifically set forth is a copy of the complaint on file in the said prior action.

Answering the second count or cause of action set forth in the said complaint this defendant admits, denies and alleges as follows:

I.

Incorporates herein the answering allegations to Paragraph I of the said first count or cause of action set forth in the said complaint, and incorporated by reference in [14] Paragraph I of the said second count or cause of action with the same force and effect as if here specifically set forth.

II.

Denies that this defendant owes the plaintiff any sum whatever; denies that this defendant received from plaintiff on or about the 1st day of December, 1947, or at any time whatever any sum whatever; alleges that with the exception of the foregoing denial this defendant has no information or belief upon the subject sufficient to enable it to answer the allegations contained in Paragraph II of the said second count or cause of action, and basing its denial on that ground, denies generally and specifically the said allegations.

As and for a separate second and independent defense to the said second count or cause of action, this defendant alleges that there was at the commencement of this action and still is another action pending in the District Court of the United States for the Northern District of California, Southern Division, between the parties to the above entitled action and for the same cause of action as that set forth in the second alleged count or cause of action contained in the said complaint on file in the above entitled action, and which prior action between the same parties and for the same subject matter and

the same cause of action is titled "Allied Lumber Company vs. Pioneer Lumber Company, Ross Matjasic, Cleveland Lumber and Door Co., a foreign corporation, Reserve Lumber Company, First Doe, Second Doe and Third Doe, Cecil Bandy" and numbered 27867R in the records of the said District Court of the United States for the Northern District of California, Southern Division, and that attached hereto, marked "Exhibit A" and by this reference made a part hereof, and incorporated herein with the same force and effect as if it were specifically set [15] forth is a copy of the complaint on file in the said prior action.

As and for a third separate and independent defense to each of the said alleged causes of action set forth in the complaint, this defendant alleges that the plaintiff has heretofore waived all causes of action against this defendant.

As and for a fourth separate and independent defense to each of the said alleged causes of action set forth in the complaint, this defendant alleges that the plaintiff is estopped by reason of its conduct from asserting against this defendant the said alleged causes of action, or either of them.

Wherefore defendant prays that further proceedings in the above entitled action be stayed pending the entry of a final judgment in the said prior action hereinabove referred to, and that this defendant be thence dismissed with its costs of suit incurred and to be incurred herein, and for such

other and further relief as to this court may seem proper in the premises.

/s/ RUDOLPH J. SCHOLZ,

Attorney for Allied Lumber
Company. [16]

EXHIBIT "A"

In the District Court of the United States for the
Northern District of California, Southern
Division

No. 27867R Dept.

ALLIED LUMBER COMPANY,

Plaintiff,

vs.

PIONEER LUMBER COMPANY, ROSS MAT-
JASIC, CLEVELAND LUMBER & DOOR
CO., a foreign corporation, RESERVE LUM-
BER COMPANY, FIRST DOE, SECOND
DOE and THIRD DOE, CECIL BANDY,
Defendants.

CIVIL COMPLAINT

I.

Allied Lumber Company is a California corpora-
tion with its principal place of business in the
county of Santa Clara, state of California. Plaintiff
was informed and believes and upon such informa-
tion and belief alleges that Cleveland Lumber and
Door Co. and Reserve Lumber Company were and
at all times herein mentioned are foreign corpora-

tions with its principal place of business in Cleveland, Ohio. That the Pioneer Lumber Company was and is a partnership composed of Ross Matjasic and Cecil Bandy.

II.

That the true names of the defendants First Doe, Second Doe and Third Doe are unknown to plaintiff, and plaintiff prays that when they are ascertained that they may be inserted in this [17] Complaint and all subsequent proceedings. That the Reserve Lumber Company claims some interest in and to the matters involved in this Complaint, but the nature or extent of their interest is unknown to plaintiff.

III.

That within two years next last past, Cleveland Lumber and Door Co. ordered from plaintiff lumber according to certain specifications; that plaintiff, as broker, transmitted said order to the Pioneer Lumber Company; that the Pioneer Lumber Company agreed to complete said order and ship direct to Cleveland Lumber and Door Co. provided that Cleveland Lumber and Door Co. paid Pioneer Lumber Company the sum of \$16,808.05 on its sight draft, all of which Cleveland Lumber and Door Co. consented to do. That thereupon Pioneer Lumber Company forwarded said lumber to Cleveland Lumber and Door Co. at Cleveland, Ohio, for which they received from Cleveland Lumber and Door Co. said sum of \$16,808.05 on said sight draft. That shortly after the arrival of said lumber at Cleveland, Ohio,

Cleveland Lumber and Door Co. stated to Pioneer Lumber Company and plaintiff that the same was not according to said specifications and that the Cleveland Lumber and Door Co. was drawing a sight draft on the Pioneer Lumber Company for the amount it paid Pioneer Lumber Company. That plaintiff was informed and believes and therefore alleges that said sight draft was not paid nor was any sum paid Cleveland Lumber and Door Co. Plaintiff was informed and believes and therefore alleges that the Cleveland Lumber and Door Co. has returned the said lumber to the Pioneer Lumber Company and that said lumber is now under its control and custody.

Wherefore, plaintiff prays that the court determine the respective rights of the parties hereto.

RUDOLPH J. SCHOLZ,
Attorney for plaintiff.

Affidavit of service by mail attached.

[Endorsed]: Filed June 1, 1948. [18]

In the District Court of the United States for the
Southern District of California, Central Division

Civil Action No. 8058—PH

THE CLEVELAND LUMBER AND DOOR
COMPANY,

Plaintiff,

vs.

ALLIED LUMBER COMPANY: CECIL L.
BANDY; and CECIL L. BANDY doing busi-
ness under the fictitious firm name and style of
PIONEER LUMBER COMPANY,

Defendants.

MOTION TO CONSOLIDATE

To: The Cleveland Lumber and Door Company, the
plaintiff above named; Newlin, Holley, Sand-
meyer and Tackabury, its attorneys; Cecil L.
Bandy; and Cecil L. Bandy, doing business
under the fictitious firm name and style of
Pioneer Lumber Company; and to Avery Seay
and Lloyd J. Seay, his attorneys:

You and each of you will please take notice that
on the 14th day of June, 1948, in the courtroom
of the above entitled court at the hour of ten o'clock
a.m., or as soon thereafter as counsel may be heard,
Allied Lumber Company, one of the defendants
above named, by and through its undersigned at-
torney, will move the above entitled court for an
order consolidating the above entitled action with

that certain court action between the parties above named and for the same cause of action set forth in the complaint on file herein which was commenced prior to the commencement of the above entitled action and is still pending in the District Court of [20] the United States for the Northern District of California, Southern Division, titled "Allied Lumber Company vs. Pioneer Lumber Company, Ross Matjasic, Cleveland Lumber and Door Co., a foreign corporation, Reserve Lumber Company, First Doe, Second Doe and Third Doe, Cecil Bandy" and numbered 27867R in the records of the said court.

The said motion will be based on the ground that the ends of justice and the interests of the parties will best be served by consolidating the said actions for trial in the District Court of the United States for the Northern District of California, Southern Division, and that a multiplicity of actions which would otherwise result shall thus be avoided.

The said motion will be made and based upon this notice and upon all the records and papers on file in the above entitled action and in the said prior action hereinabove referred to.

Dated May 29, 1948.

/s/ RUDOLPH J. SCHOLZ,

Attorney for Allied Lumber
Company.

Memorandum of authorities in support of foregoing motion:

Fed. Rules of Civil Procedure, Rule 42 (a);
California Code of Civil Procedure, Sec.
1048.

Affidavit of service by mail attached.

[Endorsed]: Filed June 1, 1948. [21]

[Title of District Court and Cause.]

ORDER DENYING MOTION TO
CONSOLIDATE

Defendant Allied Lumber Company's motion to consolidate the above entitled action with an action entitled "Allied Lumber Company vs. Pioneer Lumber Company, et al," numbered 27867-R pending in the District Court of the United States for the Northern District of California, Southern Division, having been duly heard on the 12th day of July, 1948, all parties being represented by counsel,

It Is Hereby Ordered that said motion be and it is hereby denied.

Dated July 14th, 1948.

/s/ PAUL J. McCORMICK,

Judge of the U. S. District
Court.

Approved as to form pursuant to local Rule No. 7.

RUDOLPH J. SCHOLZ,

HAROLD J. CASHIN,

Attorneys for Allied Lumber
Company.

LLOYD J. SEAY,

Attorney for Cecil L. Bandy and Cecil L. Bandy,
doing business under the fictitious name and
style of Pioneer Lumber Company. [24]

Affidavit of service by mail attached.

[Endorsed]: Filed July 14, 1949. [23]

United States District Court, Southern District of
California, Central Division

No. 8058-PH. Civil

THE CLEVELAND LUMBER AND DOOR
COMPANY,

Plaintiff,

vs.

ALLIED LUMBER COMPANY; CECIL L.
BANDY; and CECIL L. BANDY Doing Busi-
ness Under the Fictitious Firm Name and Style
of PIONEER LUMBER COMPANY,

Defendants.

OPINION

Cavanah, District Judge.

The present action is brought by The Cleveland Lumber and Door Company against the Allied

Lumber Company and the Pioneer Lumber Company for a rescission of a written contract for the purchase of two carloads of dried lumber thoroughly air-dried redwood siding to be shipped to the plaintiff at Cleveland, Ohio, upon two orders of plaintiff accepted by the defendant Allied Lumber Company which appeared when arriving at Cleveland to be green. The purchase price was by the plaintiff to the defendant Allied Lumber Company. The defendant Allied Lumber Company not having the lumber in stock, without the knowledge of the [27] plaintiff, requested the defendant Pioneer Lumber Company to ship the lumber to the plaintiff. On receipt of the defendant Allied Lumber Company's order the defendant Pioneer Lumber Company diverted the two cars to the plaintiff which it had consigned to the Elliott Lumber Company at Danville, Illinois. The defendant Pioneer Lumber Company at that time had purchased two carloads of redwood beveled siding from Hammond Lumber Company of Los Angeles for consignment to the Elliott Lumber Company of Danville, Illinois, who was not connected with the present litigation, and on receipt of the defendant Pioneer Lumber Company's order it diverted the cars to the plaintiff. The purchase by the defendant Pioneer Lumber Company from the Hammond Lumber Company was as green lumber, but the Pioneer Lumber Company with the shipment to the plaintiff sent an invoice to the plaintiff describing the lumber as "air-dry." The defendant Allied Lumber Company requested

the plaintiff to pay the purchase price for the lumber directly to the defendant Pioneer Lumber Company by the telegraphing of funds to cover the purchase price, which was done and the lumber was paid for before it arrived at the yards of the plaintiff in Cleveland. On its inspection by the plaintiff it was found to be not air-dried but green. The plaintiff then promptly demanded of the defendants the return of the \$15,087.60, which it had paid for the lumber, and requested advice from the defendants as to what disposition the defendants desired to make of the lumber. The notice was sufficient notice of rescission under the evidence. The defendants have not returned to the plaintiff the purchase price of the lumber nor given any order to plaintiff as to what they wish done with the lumber.

There seems to be no question that the lumber shipped to the plaintiff was not in accordance with specifications as it was green instead of air-dried, and the plaintiff after paying the purchase is entitled to a rescission of the contract for the purchase of it and a recovery of the purchase price which it paid and legal interest from date of rescission, together with such expenses as handling, freight and storage charges.

The primary questions involved are whether the plaintiff may secure judgment against both of the defendants as contended for by it to the extent of the amount of its loss, or whether such recovery should be confined against the defendants separately.

The contention of the defendant Allied Lumber Company is that it was the agent of the defendant Pioneer Lumber Company, and also that there was a novation resulting in a substitution of the defendant Pioneer Lumber Company for the defendant Allied Lumber Company as the obligor under the contract, while the defendant Pioneer Lumber Company asserts that it was the agent of the defendant Allied Lumber Company, and both assert that the plaintiff should be required to make an election. In response to these contentions the plaintiff contends that it has the right to recover against both of the defendants for the full amount of the purchase price of the lumber and expenses.

An analysis of the evidence discloses that none of the relationships contended for by the defendants existed as the two orders for the purchase of the lumber were by the plaintiff transmitted to the defendant Allied Lumber Company and accepted by it which constituted the contract between the plaintiff and the defendant Allied Lumber Company and revealed that the Allied Lumber Company was acting for itself and was the shipper. The fact that after the [29] contract had been executed the plaintiff received information that the defendant Pioneer Lumber Company was the defendant Allied Lumber Company's supplier did not alter the legal relationship created by the contract between the plaintiff and the defendant Allied Lumber Company, *Pickands, Mather & Co. v. H. A. & D. W. Kuhn & Co.*, 8 F. (2d) 704. The evidence does not disclose

that the defendant Pioneer Lumber Company was substituted in place of the defendant Allied Lumber Company in the original contract, or that the plaintiff consented and intended to release the defendant Allied Lumber Company the original obligor and accepted the defendant Pioneer Lumber Company in its place. *Illinois Car & Equipment Co. v. Linstroth Wagon Co.*, 112 F. 737; *United States, for Use and Benefit of Worthington Pump & Machinery Corporation, v. John A. Johnson Contracting Corporation et al.*, 139 F. 2d 274, certiorari denied.

To create a novation there must be consent by all of the parties to the substitution of a new party in place of the original obligor. No such consent appears in the evidence. The plaintiff insisted at all times on dealing with the defendant Allied Lumber Company, and made the payment of the purchase price to it. The contract was not canceled, and the defendant Allied Lumber Company merely advised the plaintiff that its supplier was the defendant Pioneer Lumber Company.

The mere fact that the defendant Pioneer Lumber Company was acting with the defendant Allied Lumber Company does not excuse it from the necessity of making complete restitution of the purchase price and expenses as it was guilty of wrongdoing which amounted to fraud. It invoiced and labeled the two cars shipped to the plaintiff as "air-dry" lumber knowing that the lumber shipped was green. Under such circumstances it cannot escape liability.

Stirnus v. Adams, 50 Cal. App. 730; *Hohn et al. v. Peters*, 216 Cal. 406. The fact that the defendant Pioneer Lumber Company is also compelled to make restitution as a misrepresenting wrongdoer does not relieve the defendant Allied Lumber Company also making restitution. If the defendant Allied Lumber Company feels that it has a grievance against the defendant Pioneer Lumber Company, it is privileged to institute an action against it.

As to the contention that the plaintiff should be required to make an election as against the defendant Allied Lumber Company or the defendant Pioneer Lumber Company is not tenable under the evidence and the principle of law applicable. *Heintzsch et al. v. LaFrance et al.*, 3 Cal. (2d) 180; *Joseph Denunzio Fruit Co. v. Crane*, 79 F. Supp. 117. Thus, the motion that the plaintiff elect whether it will take judgment against one of the defendants is denied, as the conclusion is reached that both of the defendants are liable to the plaintiff. Therefore, the plaintiff is entitled to recover the amount of the purchase price paid by it, together with legal interest thereon, storage handling charges, and freight and demurrage charges against both of the defendants, and the defendants are directed to remove the lumber from the premises of the plaintiff, and costs of suit.

Counsel for the plaintiff will prepare Findings and Decree. [31]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action regularly came on for trial on October 19, 1948, and was tried on October 19, 20, 21 and 22, 1948, before the Honorable Charles C. Cavanah, District Judge, without a jury. Plaintiff appeared by Newlin, Holley, Sandmeyer & Tackabury, by Frank R. Johnston, its attorneys; defendant Allied Lumber Company appeared by Rudolph J. Scholz and Wallace, Cashin & Arrington, by Rudolph J. Scholz and Harold J. Cashin, its attorneys; defendant Cecil L. Bandy and Cecil L. Bandy, doing business under the fictitious firm name and style of Pioneer Lumber Company, appeared by Lloyd J. Seay, his attorney. Evidence, oral and documentary, was received and the evidence having been closed and the matter fully argued by counsel for the respective parties, the matter was taken under submission by the Court. The Court thereafter announced its [32] decision in favor of the plaintiff and now makes and files its written Findings of Fact and Conclusions of Law as follows:

The Court Finds:

I.

On January 26, 1948, and at all times continuously since said date:

(a) Plaintiff has been and now is a corporation organized under and existing by virtue of the laws of the State of Ohio;

(b) Defendant Allied Lumber Company has been and now is a corporation organized under and existing by virtue of the laws of the State of California;

(c) Defendant Cecil L. Bandy and Cecil L. Bandy, doing business under the fictitious firm name and style of Pioneer Lumber Company, has been and now is a resident and citizen of the State of California and has been and now is the sole owner of Pioneer Lumber Company.

II.

On October 14, 1947, plaintiff and defendant Allied Lumber Company entered into a written agreement whereby in consideration of the payment of \$15,087.60 by plaintiff to defendant Allied Lumber Company, defendant Allied Lumber Company agreed to furnish and deliver to plaintiff at Cleveland, Ohio, two carloads of certain lumber, to wit, $\frac{5}{8}$ x 8, A and better, thoroughly air dried redwood bevel siding.

III.

On October 14, 1947, defendant Allied Lumber Company, without the knowledge of plaintiff, entered into an agreement with Pioneer Lumber Company whereby Pioneer Lumber Company agreed to deliver to plaintiff at Cleveland, Ohio, two cars of $\frac{5}{8}$ x 8, A and better, air dried redwood bevel siding in consideration of the payment by Allied Lumber Company to Pioneer Lumber Company of \$13,440.00.

Pioneer Lumber Company, on November 19, 1947, purchased two [33] cars of redwood bevel siding from the Hammond Lumber Company at Los Angeles, California. Said cars of lumber were sold to and purchased by Pioneer Lumber Company, as green lumber and were so invoiced by Hammond Lumber Company to Pioneer Lumber Company. At no time did defendants or anyone acting under their direction subject said lumber to any drying process whatsoever. Defendant Cecil L. Bandy and Cecil L. Bandy, doing business under the fictitious firm name and style of Pioneer Lumber Company invoiced said lumber to plaintiff by invoices dated November 29, 1947, and December 3, 1947, as air dry lumber and said defendant at all times knew that said lumber was green and not air dry. Pioneer Lumber Company consigned and shipped said two cars of redwood bevel siding purchased by said defendant from Hammond Lumber Company to plaintiff and said two cars arrived at plaintiff's yard in Cleveland, Ohio, on December 11, 1947, together with said invoices of Pioneer Lumber Company dated November 29, 1947, and December 3, 1947.

IV.

Pursuant to demand of defendant Allied Lumber Company, plaintiff telegraphed the sum of \$15,-087.60 to the order of defendant Allied Lumber Company on December 5, 1947, in payment of the purchase price of said lumber and on December 5, 1947, defendant Allied Lumber Company paid Pioneer Lumber Company, from said sum of \$15,-

087.60 the amount of \$13,440.00 and retained the amount of \$1,647.60.

V.

On arrival of said two cars of redwood bevel siding at the yard of plaintiff in Cleveland, Ohio, on December 11, 1947, plaintiff inspected said cars and found the lumber therein to be green and not air dry. On or before December 20, 1947, plaintiff gave notice of rescission to defendants by demanding back the purchase price plaintiff had paid for said lumber and by requesting advice of defendants as to what disposition defendants desired to make of the lumber. [34]

Defendants have not returned to plaintiff the purchase price of the lumber and have not given any order to plaintiff as to disposition of the lumber, and said lumber has remained stored since December 11, 1947, in the yard of plaintiff.

VI.

The agreement, hereinabove referred to in paragraph II hereof by the terms of which defendant Allied Lumber Company agreed to deliver to plaintiff at Cleveland, Ohio, thoroughly air dried redwood bevel siding, remained in full force and effect until rescinded by plaintiff as found in paragraph V hereof and the lumber delivered to plaintiff at Cleveland, Ohio, was not in conformity with that agreed to be delivered by the terms of said agreement, in that said lumber was green and not air dried, or air dry.

Defendant Allied Lumber Company did not at any time in connection with the purchase and sale of said lumber to plaintiff act as an agent or broker.

No act, acts or conduct by plaintiff have created an estoppel, waiver, or other relinquishment of plaintiff's right of restitution against all defendants.

Defendant Cecil L. Bandy and Cecil L. Bandy, doing business under the fictitious firm name and style of Pioneer Lumber Company, wilfully, knowingly and fraudulently delivered green lumber to plaintiff at Cleveland, Ohio, and wilfully, knowingly and fraudulently invoiced said lumber as air dry.

VII.

Plaintiff has expended in connection with the purchase of said lumber the following sums for the items hereinafter set forth:

Purchase price of lumber.....	\$15,087.60
Freight	1,713.43
Reconsignment charges	7.02
Demurrage	84.98
Unloading, tallying and piling charges	199.68
Storage charges	690.00
<hr/>	
Total	\$17,782.71

CONCLUSIONS OF LAW

As Conclusions of Law, the Court finds and concludes:

I.

That plaintiff is entitled to judgment in the sum of \$17,782.71 together with interest on the purchase price from and after December 20, 1947, at the rate of 7% per annum, to wit, \$997.11 being a total of \$18,779.82, together with plaintiff's costs of suit, against the defendants, and each of them.

Defendants are directed to remove at their expense the lumber from plaintiff's premises upon full satisfaction of the judgment herein, provided said lumber has not theretofore been sold on foreclosure of plaintiff's statutory lien thereon.

Dated: December 13th, 1948.

/s/ CHARLES C. CAVANAH,

District Judge.

Approved as to form:

RUDOLPH J. SCHOLZ and
WALLACE, CASHIN AND
ARRINGTON,

Attorneys for Defendant
Allied Lumber Company.

/s/ LLOYD J. SEAY,

Attorney for Defendant Cecil L. Bandy and Cecil
L. Bandy, doing business under the fictitious
name and style of Pioneer Lumber Company.

Lodged Dec. 1, 1948.

Received copy of the within Proposed Findings this 1st day of December, 1948.

WALLACE, CASHIN &
ARRINGTON.

By /s/ HAROLD J. CASHIN,
One of Attorneys for Defendant Allied Lumber Co.

(Suggesting that copy should be served on Rudolph J. Scholz in San Francisco, who is principal Attorney of record for Allied Lumber Co.

[Endorsed]: Filed Dec. 15, 1948. [36]

In the District Court of the United State for the
Southern District of California, Central Division

Civil Action No. 8058-PH

THE CLEVELAND LUMBER AND DOOR
COMPANY,

Plaintiff,

vs.

ALLIED LUMBER COMPANY, et al.,

Defendants.

JUDGMENT

This action regularly came on for trial on October 19, 1948, and was tried on October 19, 20, 21 and 22, 1948, before the Honorable Charles C. Cavanah, District Judge, without a jury. Plaintiff

appeared by Newlin, Holley, Sandmeyer & Tackabury, by Frank R. Johnston, its attorneys; defendant Allied Lumber Company appeared by Rudolph J. Scholz and Wallace, Cashin & Arrington, by Rudolph J. Scholz and Harold J. Cashin, its attorneys; defendant Cecil L. Bandy and Cecil L. Bandy, doing business under the fictitious firm name and style of Pioneer Lumber Company, appeared by Lloyd J. Seay, his attorney. Evidence, oral and documentary, was received and the evidence having been closed and the matter fully argued by counsel for the respective parties, the matter was taken under submission by the Court. The Court thereafter announced its [38] decision in favor of the plaintiff and has made and filed herein its written Findings of Fact and Conclusions of Law; Now, Therefore,

It Is Ordered, Adjudged and Decreed that plaintiff have judgment in the sum of \$18,779.82, together with plaintiff's costs of suit in the amount of \$185.76, against defendants, and each of them.

It Is Further Ordered, Adjudged and Decreed that defendants be and they are hereby directed to remove at their expense the lumber delivered to plaintiff by defendants from plaintiff's premises upon full satisfaction of the judgment herein, provided that said lumber has not theretofore been sold on foreclosure of plaintiff's statutory lien thereon.

Dated: December 13th, 1948.

/s/ CHARLES C. CAVANAH,

District Judge.

Approved as to form:

RUDOLPH J. SCHOLZ and
WALLACE, CASHIN AND
ARRINGTON,

Attorneys for Defendant
Allied Lumber Company.

/s/ LLOYD J. SEAY,
Attorney for Defendant Cecil L. Bandy and Cecil
L. Bandy, doing business under the fictitious
name and style of Pioneer Lumber Company.

Received copy of the within Proposed Judgment
this 1st day of December, 1948.

WALLACE, CASHIN &
ARRINGTON,

By /s/ HAROLD J. CASHIN,
One of Attorneys for Allied
Lumber Co.

(Suggested that copy should be sent to Rudolph
J. Scholz in San Francisco, who is principal attor-
ney of record for Allied Lumber Co.)

Judgment entered Dec. 16, 1948.

Docketed Dec. 16, 1948. [39]

[Endorsed]: Filed Dec. 15, 1948.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Plaintiff in the above-entitled action and to
Newlin, Holley, Sandmeyer & Tackabury, at-
torneys for plaintiff:

You and each of you will please take notice that
the defendant in the above-entitled action, Allied
Lumber Company, hereby appeals to the United
States Circuit Court of Appeals for the Ninth Cir-
cuit from the final judgment given, made and en-
tered in the above-entitled action and from the whole
thereof, which judgment was entered on the 16th day
of December, 1948, in Judgment Book 54, Page
533.

/s/ RUDOLPH J. SCHOLZ,

Attorney for Said Defendant.

Received copy of the within Notice of Appeal
this 29th day of December, 1948, 3:07 p.m.

NEWLIN, HOLLEY, SANDMEYER &
TACKABURY.

By /s/ DOROTHY S. UPDEGRAFF,

Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 29, 1948. [42]

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED
UPON ON APPEAL

I.

That sale was made by Pioneer Lumber Company to Cleveland Lumber and Door Company.

II.

Allied Lumber Company was merely a merchandise broker.

III.

That the Court should have required Cleveland Lumber and Door Company to make an election against which defendant it desired judgment.

IV.

That judgment cannot be against both principal and agent in this case.

V.

That Cleveland is estopped from asserting this cause of action against Allied. That it ratified the sale by Pioneer Lumber [43] Company and/or waived any of its rights against Allied Lumber Company.

VI.

The pleadings do not permit a judgment against Allied Lumber Company.

VII.

No rescission was made as to Allied Lumber Company.

VIII.

Novation.

IX.

That the findings of fact do permit a fair understanding under Rule 52(a) of Federal Rules of Civil Procedure.

X.

That the Court erred in the following findings: I (c), IV, V, VI.

XI.

That the court erred in the following conclusions of law: (a) plaintiff is entitled to judgment against this defendant; (b) That plaintiff is entitled to interest; (c) That plaintiff was entitled to sell said lumber by foreclosure of plaintiff's statutory lien.

XII.

That the Court erred in denying motion to consolidate.

/s/ RUDOLPH J. SCHOLZ,
Attorney for Defendant
Allied Lumber Company.

Received copy of the within Statement of Points
this 29th day of December, 1948, 3:07 p.m.
NEWLIN, HOLLEY, SANDMEYER &
TACKABURY.

By /s/ DOROTHY S. UPDEGRAFF,
Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 29, 1948. [45]

[Title of District Court and Cause.]

PRAECIPE FOR PREPARATION OF
RECORD ON APPEAL

To the Clerk of the above-entitled Court:

Defendant Allied Lumber Company having filed herein its Notice of Appeal in the above-entitled action, you are hereby requested to prepare record on appeal consisting of the following:

1. Pleadings except complaint.
2. Decision of the Court.
3. Findings and judgment.
4. Notice of Appeal.
5. Order denying motion to consolidate.

/s/ RUDOLPH J. SCHOLZ,

Attorney for Defendant. [46]

Received copy of the within Praecipe for Preparation of Record on Appeal this 29th day of December, 1948, 3:07 p.m.

NEWLIN, HOLLEY, SANDMEYER &
TACKABURY.

By /s/ DOROTHY S. UPDEGRAFF,
Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 29, 1948. [47]

United States District Court in and for the
Southern District of California, Central Division

No. 8058-PH Civil

THE CLEVELAND LUMBER AND DOOR
COMPANY,

Plaintiff,

vs.

ALLIED LUMBER COMPANY; CECIL L.
BANDY; and CECIL L. BANDY, doing busi-
ness under the fictitious firm name and style
of PIONEER LUMBER COMPANY,
Defendants.

Honorable Charles C. Cavanah, Judge, Presiding

REPORTER'S TRANSCRIPT
OF PROCEEDINGS

Los Angeles, California
Tuesday, October 19, 1948

Appearances:

For the Plaintiff: Messrs. Newlin, Holley, Sand-
meyer & Tackabury, by Frank R. Johnston, Esq.

For the Defendant Allied Lumber Co.: Rudolph
J. Scholz, Esq., and [1*] Messrs. Wallace, Cashin
and Arrington, by H. J. Cashin, Esq.

For the Defendant C. L. Bandy, Pioneer Lumber
Co.: Lloyd J. Seay, Esq. [2]

* Page numbering appearing at top of page of original Reporter's
Transcript.

Q. Mr. Coombs, you testified that this lumber was sold to the Pioneer Lumber Company here in Los Angeles, is that correct? A. Yes, sir.

Q. So far as you know, so far as Hammond Lumber Company knew, Allied Lumber Company had nothing to do with it?

A. No, sir. Our dealings were with Pioneer Lumber Company. We never knew anybody else at all.

They didn't enter into the transaction.

Q. And you have on this exhibit 16 "Will Call Nov. 28" and on the other one "Will Call Dec. 2." Does that mean that the Pioneer Lumber Company would call for the lumber on those dates?

A. Those are the dates on which they were shipped. These are shipping dates. The bill of lading will confirm the actual shipping date.

Q. Then, on Exhibit 17, "Will Call Dec. 2," you have on this copy stamped "Paid by Check Dec. 3, 1947." A. That is right.

Q. That was paid by the Pioneer Lumber Company?

A. That was paid by the Pioneer Lumber Company, yes, sir.

Q. In other words, this was a c.o.d., is that correct? A. That is right. [35]

* * *

Q. Mr. Beaumont, I show you invoice of the Cleveland Lumber and Door Company, dated December 15, 1948, to Pioneer Lumber Company and/or Allied Lumber Company, reading as follows:

To unloading, tallying and piling approximately 60,000 $\frac{1}{2}$ by 8 redwood siding contained in car IC 37703, [48] three men, total $29\frac{1}{2}$ hours each, at \$1.06 $\frac{1}{2}$ per hour, \$94.25.

I will ask you if that represents the cost incurred by you in unloading the IC car.

A. That was our actual cost.

Mr. Johnston: I would like to offer this document in evidence.

Mr. Scholz: May I see it just a minute, before you offer it in evidence.

Mr. Johnston: Certainly. I will question him about this second document. (Mr. Johnston hands document to Mr. Scholz.)

Mr. Scholz: This is the one you are offering now?

Mr. Johnston: Yes.

The Court: Is there any objection?

Mr. Scholz: Well, if your Honor please, of course, I think our objection may come prematurely. We never received a copy of this, and I presume you are going to ask him if he sent us a copy and, of course, our objection would be, anyway, that it is not binding upon us, because under our theory of the case this deal is entirely between Pioneer and Cleveland at this time.

The Court: You object to it now. Does the evidence show that he received a copy of that?

Mr. Johnston: Your Honor, no copy. I don't think a copy was sent to these gentlemen, was it, Mr. Beaumont? [49]

The Witness: Not to my knowledge. [50]

* * *

Q. (By Mr. Scholz): Isn't it a fact that your own witness testified yesterday, Mr. Coombs, that the lumber was paid for on delivery and I asked him if it wasn't marked c.o.d. and he said yes and that it was paid for on delivery? [64] Is that correct?

A. The records would show that. I don't know.

Q. I mean you have nothing to contradict these records, have you? A. No.

Q. That is——

A. You mean the Hammon Company records?

Q. Yes, or your record on that invoice.

A. I have nothing to contradict either the Hammond Lumber Company invoices or the Pioneer Lumber Company invoices.

Mr. Scholz: That is what I wanted to bring out. Now, those invoices from the Pioneer Lumber Company to Cleveland, Exhibits 9 and 10, were the only invoices you received, is that correct?

The Witness: For these two cars of siding?

Mr. Seay: Yes.

The Witness: Yes.

Q. (By Mr. Seay): You never received any from Allied? A. No.

Q. And those invoices received, referring again to Exhibits 9 and 10 from Pioneer to Cleveland, were received in the ordinary custom of the mail? I mean, they were duly delivered in a due course of mailing the invoices from Pioneer to you, is that correct? [65]

A. They were received in the mails.

Q. That is right, in the due course of mails. You have nothing to contradict that, have you?

A. Only the fact that they were received after we had paid for the two cars of lumber, after——

Q. That is right, in the ordinary course of mail.

A. In the ordinary course of mail, but not in the ordinary course of invoices being received. We normally receive invoices before we pay for the cars, but, in this case, we received them afterward.

Q. You are a hundred per cent correct. I agree with you, a hundred per cent, on that.

A. Yes, sir.

Q. Now, Allied Lumber Company—now, to shorten it, I will refer to Allied Lumber Company as “Allied” so we will be clear on that.

A. Yes.

Q. (By Mr. Scholz): Allied never invoiced you, as you stated, nor did they ever send you the bill of lading, did they, on this lumber? A. No.

Q. The bill of lading you received was from the Pioneer Lumber Company, isn't that correct?

A. We received them from the bank.

Q. Yes, the Bank of America, 8th and Vermont, Los [66] Angeles, California, is that correct?

A. No. We received them from our bank in Cleveland whom the Bank of America forwarded them to.

Q. It was forwarded by the Bank of America, 8th and Vermont Streets, Los Angeles, to your bank in Cleveland? A. That is correct. [67]

Mr. Scholz: May I see Exhibit 6, Mr. Clerk, please?

Q. Mr. Beaumont, through your counsel you offered in evidence Plaintiff's Exhibit 6, which states, "We Hold Bill of Lading," designating the car.

A. SL and SF 149239.

Q. Yes, and I believe you testified yesterday that you received this telegram, is that correct, from the Bank of America, 8th and Vermont Street?

A. That is right.

Q. And you will note on there that it states, "We Hold Bill of Lading to Car SL and SF 149239 and Invoice Covering 60,000 and $\frac{5}{8}$ by 8 Redwood Siding Net Amount 7,543. Have Your Bank Wire Us Funds for the Account of Pioneer Lumber Co.," signed "Bank of America NT&SA 8th and Vermont Branch," dated December 3, is that correct?

Well, there are two dates on there. One is December 2nd and the other December 3rd, due to the difference in time.

A. We received that telegram at 9:10 a.m. on December 3.

Q. That is right.

A. That is right.

Q. I am calling your particular attention to "For the Account of Pioneer Lumber Co." When you received that wire, [70] you did so wire in accordance with that instruction, did you not?

The Witness: Could I look at my file just a minute?

Mr. Scholz: Certainly.

The Witness: I think there were two or three wires from the Bank of America.

Mr. Scholz: You have them in the exhibits there. I am just asking you about one. There are two wires, as I recollect, but I can't cover everything at one time. I have to take one thing at a time. I am referring to this particular wire right now.

The Witness: That is the reason why I want to give you the right answer.

Mr. Scholz: Let me see those checks.

The Witness: My records indicate that this payment of December 5th of ours was in answer to this Exhibit 6.

Q. (By Mr. Scholz): Now, referring to Plaintiff's Exhibit 4—may I have that, Mr. Clerk? Would you mind handing that to him?

The Clerk: Certainly.

Mr. Scholz: Now, that telegram is dated November 19, 1947, is it not? A. That is right.

Q. And that telegram also refers to the Pioneer Lumber Company, in other words, is simply states that the "Pioneer [71] Lumber Requires Telegraphic Funds" upon "Presentation" of "Bill of Lading Bank America Los Angeles," is that correct? A. That is part of the telegram.

Q. And then the money which you forwarded to the Bank of America was pursuant to the telegrams from the Bank of America, Los Angeles, and also this wire, Plaintiff's Exhibit 4, is that correct?

A. That appears to be correct.

Q. Now referring to the freight bill, you never called Allied's attention in any way or sent them any telegrams or wires or in conversation of any

kind called their attention to these, to these freight bills?

A. Called attention to the freight bills——

Q. I want to make it clear. What I am trying to get is this, is that the freight bills show that the Pioneer is the shipper, you see. Now, I want to know if you have any knowledge that Allied's attention was called to these freight bills.

Mr. Johnston: Just a minute. I am going to object on that. The question violates the best evidence rule. A letter of December 18th from Cleveland to Allied demands money back, purchase price plus expenses.

Mr. Scholz: No, that doesn't answer the question. It is not the best evidence, your Honor, because I am asking him if he has any wires, telegrams, or had any conversations of [72] any kind that show that he called Allied's attention to the freight bills. I am not talking about any expenses. That is a general question.

The Witness: Called Allied's attention to the freight bills, for what reason?

Mr. Scholz: I don't know. I don't think you did. I want to find out. I don't believe you ever called Allied's attention to these freight bills, and that is the question I am asking you.

Have you anything in your file or do you know of anything where you called Allied's attention to the freight bills which are offered in evidence?

A. Our telegram to Allied on December 13th. We said that we were drawing sight draft for the

entire amount paid in advance by ourselves, which would have included freight.

Q. Drawing sight draft upon whom?

A. It does not specifically say——

Q. I beg your pardon?

A. It does not specifically refer to freight.

Q. December 13th? A. That is right.

Q. Now, Mr. Beaumont, doesn't that read that you are drawing sight draft upon the Pioneer Company for the entire amount? Doesn't that so read?

Let me have Plaintiff's Exhibit 13. [73]

Mr. Beaumont, here is Plaintiff's Exhibit 13 which was offered in evidence by you yesterday and I call your attention to the fact that it states here, "We are drawing sight draft on Pioneer Lumber Company for entire amount paid in advance by ourselves." A. Entire amount.

Q. Yes.

A. That would include freight.

Q. Well, of course, I am not arguing with you on the terms.

A. Well, you asked if we ever mentioned freight charges to Allied and in that telegram we say that we are drawing for the entire amount. That would have included invoices, freight, demurrage and re-consigning.

Q. Now, in this telegram where does it state anything about freight? Does it say anything in there about freight? A. No, sir.

Q. That is right. Does it say anything about storage? A. No.

Q. Does it say anything about reconsignment?

A. No.

Q. Does it say anything about demurrage?

A. No, not in this telegram.

Q. That is right.

Now, I am asking you that question again, Mr. Beaumont: [74] Have you any documents of any kind that will show that you called Allied's attention to the freight bills?

A. The freight bills specifically, no.

Q. That is right. Now, referring to Plaintiff's Exhibit 18—may I have that, Mr. Clerk—this is Plaintiff's Exhibit 18. This is a letter dated 12-18 from Cleveland to Allied, and just to clear it up, this letter is signed by Mr. McGuire, isn't it?

A. That is right.

Q. (Continuing) —who was the vice president.

A. He is the vice president.

Q. Who was and is. A. That is right.

Q. And your counsel asked you if you signed that and I think that you stated in reply that if you signed that letter, you stated that the company sent it out. A. That is correct.

Q. Yes. In other words, to clarify that, this Plaintiff's Exhibit 18 which among other things states—I can't read the whole thing but I just want to get this one point—"I think that you, along with us, have been victims of circumstances; all of which should have been observed when Pioneer demanded telegraphic funds from a company rated, as is the Cleveland Lumber and Door Company." That

meets with your approval, that is, the approval of your company, is that [75] correct?

Mr. Johnston: Just a minute. I am going to object to that question. The document speaks for itself. Whether it meets with his approval or not is beside the point. The document is in evidence and it has gone forward to Allied Lumber Company.

Mr. Scholz: The only think is I want to clear it up. I don't think it was properly identified because I think Mr. Johnston asked if he sent that out and he said the company sent it out and I just want to be sure if that had the approval of the Company to be sent.

Mr. Johnston: You mean whether it was authorized to be sent?

Mr. Scholz: Yes.

Mr. Johnston: I will stipulate that it was. [76]

* * *

Q. (By Mr. Scholz): Now, Mr. Beaumont, you never had any conversations with Allied Lumber Company yourself, did you?

A. With Allied Lumber Company?

Q. Yes, I mean personal conversation, you never talked [80] to Allied Lumber Company yourself, did you?

A. Never spoke to them directly.

Q. That is what I mean. A. No.

Q. And isn't it a fact that as far as this was handled, this transaction was handled mostly or practically all by McGuire of your company?

A. Practically all with Mr. McGuire?

Q. Yes.

A. As far as your records are concerned, then.

* * *

Q. Now, but this wire also states that you are drawing sight draft on Pioneer for the money and request Allied to urge Pioneer to accept it, is that correct?

A. That is what the telegram says.

Q. That is right.

A. But we didn't do it.

Q. You didn't draw a sight draft on Pioneer?

A. No.

Q. Are you sure of that? A. Yes.

Q. Did you ever attempt to draw a sight draft on Pioneer? A. Yes.

Mr. Scholz: This is news to me.

Q. What did you do in regard to the sight draft, then, which you refer to in that wire?

A. We gave the total amount of the invoices, freight and other charges that we knew had accumulated, exactly, or as they were up to that time, and instructed our bank, the Union Bank of Commerce, to draw on Pioneer who we had in the meantime learned had received the bulk of the funds that we had wired to Allied, and our bank said, "Well, before we put this all in form for drawing on Pioneer, let us find out first whether Pioneer will pay it when it gets there or not."

So our bank communicated with the Bank of America and the [87] Bank of America communicated apparently with Pioneer and then called our

bank and stated that there was no need to draw a draft on Pioneer, that they wouldn't honor it, so the draft was not drawn.

Mr. Scholz: I see.

Q. Did you communicate this, these facts which you have told me, to Allied?

A. I can't say definitely whether or not our Mr. McGuire in telephone conversation advised your Mr. Estcourt that we had done this or had not done it.

Q. As far as you know, it was not communicated, is that correct, to Allied?

A. Yes, it was indirectly communicated in our letter of November 18th, which detailed everything practically up to that time when we asked you to please——

Q. Wait a minute.

A. ——give us our money back.

Q. On December 18th. Does that refer to any sight draft? A. No.

Q. Do you refer to this, that you asked your bank to sight draft the Pioneer Lumber Company and the bank stated they would find out whether Pioneer would pay it, first, and Pioneer said they wouldn't, does it say anything about that in that letter? A. It was December 13th. [88]

Q. No. Answer my question.

A. It doesn't mention a sight draft in this letter, no. It just says that we are looking to you or others for our money.

The Court: We will recess for 10 minutes.

(Whereupon a short recess was taken.)

Q. (By Mr. Scholz): Mr. Beaumont, referring to the complaint, the amended complaint that Cleveland filed against the defendants, it states—have you a copy in front of you—therein “December 15, 1947,” among other things of course, “plaintiff rescinded said agreement,” which in legal parlance of course is a legal conclusion, but the point I want to ask you is this: This rescission that you set forth in your complaint is not based on the telegram of 12-13, is it; 12-13, the telegram I believe from Cleveland to Allied, Exhibit 13?

A. That is the exhibit we were talking about just before the adjournment, referring to our drawing on Pioneer.

Q. Yes.

A. And you had asked whether we had told you that Pioneer hadn't honored that draft.

Q. Yes.

A. I find that, looking in our file here, that we advised you on December 16th of the action of the bank:

“Pioneer's Bank advises our bank as follows: ‘Your instructions [89] as to disposition of bills of lading and cars of lumber shipped to Cleveland Lumber and Door Company should come from the Allied Lumber Company. Pioneer only producing mill.’ ”

That telegram was sent to you on December 16th, which advises you after we had informed you that we were drawing on Pioneer, that they weren't honoring——

Q. That is right.

A. —and paying us.

Q. The point I am bringing up now is this: In your complaint, you state that on December 15, 1947, plaintiff rescinded said agreement.

Mr. Johnston: "On or about" is the way it is alleged.

Mr. Scholz: Yes, "That on or about December 15, 1947, by reason of the facts"—well, that doesn't continue my question. You alleged that plaintiff rescinded said agreement.

Now, I am asking you, that is not based on your telegram of 12-13, Plaintiff's Exhibit 13, I think, is it?

A. I don't think it is based on that one particular telegram, no.

Q. Of course, I am only speaking so far as Allied Lumber Company is concerned, now. Of course, you understand that, don't you? A. Yes.

Q. Upon what do you base your rescission as far as Allied Lumber Company is concerned, upon any telegrams or letters?

A. We based it on the order that we placed with Allied which we considered they filled in shipping these two cars and the fact that we directed our money to the Allied Lumber Company.

Q. That is all you based your rescission on?

A. Yes.

Q. And did you give any notice of rescission to Allied?

Mr. Johnston: Just a minute.

The Witness: I can't say definitely.

Mr. Johnston: Just a minute.

Mr. Scholz: He has already answered.

Mr. Johnston: All right. Very well.

Mr. Scholz: I don't want to preclude you.

Mr. Johnston: I don't think he understands the question, but I will bring that out.

Mr. Scholz: I don't want to take advantage.

Q. Did you understand that question?

A. I am not positive that I do.

Mr. Scholz: Mr. Reporter, will you read the question?

(Question read by reporter.)

Q. (By Mr. Scholz) (Continuing): Notice of rescission as far as the Allied Lumber Company is concerned upon any telegrams [91] or letters.

Mr. Johnston: Would you ask him if he knows what rescission means? That is a phrase employed by lawyers. If you will put that in layman's language and then ask him the question, I think he can answer the question.

Mr. Scholz: I don't think that is pertinent. He has his own interpretation of what rescission means, but I will say this, as a matter of law and my interpretation of law which may be wrong, too, that if you rescind a contract, you must rescind it promptly upon discovering the facts upon which you base the rescission and at that same time you must return everything of value which you received under the contract or offer to return everything of value. Now, assuming that that is the law or at

least that is what I mean by rescission, have you any papers, documents, letters, telegrams or any correspondence upon which you based the rescission as far as Allied is concerned and which you stated in your complaint?

Mr. Johnston: Just a minute. I am going to object to that on the grounds that the documents indicating rescission are already in evidence. There are a number of telegrams and a letter.

Mr. Scholz: I think he has a right to answer that question.

The Court: You mean if he has any others than what is [92] in evidence?

Mr. Scholz: Yes, your Honor. I put it that way, other than what is in evidence, yes.

The Court: He may answer that. Objection overruled.

The Witness: I don't know as there is anything other than what is in evidence.

Mr. Scholz: All right.

Q. Now, I will ask you this question: On what particular paper or document that is in evidence did you base your notice of rescission as to Allied Lumber Company?

Mr. Johnston: I object to that. It is incompetent, irrelevant and immaterial. He does not have to base it on any one or any particular document. He can base it on a series of documents.

The Court: Sustained.

Mr. Scholtz: I will amend that question to say this:

Q. Then, upon what document that is in evidence here or any series of documents that are in evidence here, do you base this rescission as to the Allied Lumber Company?

A. On our original orders to Allied Lumber Company and their acceptance of them.

Q. Now, upon what document in evidence or any series of documents in evidence do you base your notice of rescission to Allied Lumber Company, to wit, offering to return everything of value received, to wit, the lumber I presume in [93] this case, or offering to return everything of value or the lumber and demanding in return that you be refunded your money?

A. Well, I would say in addition to the various exhibits that are now on record in the form of telegrams, that our letter of December 18th, the second to the last paragraph in which we say, "Please let me hear from you immediately, either with your check—or somebody's check to cover"—

Q. Do you recall what the exhibit is?

A. I don't know what exhibit it is in the file.

Q. That is the letter of December 18th?

A. Our letter to Allied Lumber Company.

Mr. Scholz: Would you mind handing this to the witness? That is Plaintiff's Exhibit 18, is that correct?

The Witness: That is right.

Mr. Scholz: Mr. Clerk, is there a telegram from Cleveland to Allied dated December 16th in evidence? I think Mr. Beaumont read from it just recently.

Q. Do you have that copy of that telegram, Mr. Beaumont? A. Yes.

Q. May I see it? This is the one.

Mr. Johnston: It is not in evidence, Mr. Scholz. Here is a copy of it. I am going to offer it later.

Mr. Scholz: All right. I will return these for your [94] file.

Mr. Johnston: All right.

Q. (By Mr. Scholz): Mr. Beaumont, you just referred a few minutes ago to a telegram from Cleveland to Allied Lumber Company, that the bank advised you that the bills of lading, as to disposition of bills of lading of cars of lumber shipped to Cleveland should come from the Allied. Now, I hand you herewith a copy of that telegram which I received from your counsel and ask you if this is a correct copy of that to which you referred.

A. To the best of my knowledge.

Q. And that states that the Pioneer bank advised your bank among other things——

A. That Pioneer's bank advised our bank.

Q. That is right.

Mr. Scholz: I will offer this for the purpose of identification, and then offer it in evidence.

The Clerk: Marked Defendant Allied's Exhibit C for identification.

(Said document so offered was marked Defendant Allied's Exhibit C, for identification.)

* * *

Q. I am asking the question. You knew then,

did you not, on that date that the Pioneer's bank was the Bank of America here in Los Angeles?

A. On December 16th, yes.

Q. On December 16th, yes?

A. That is correct.

Q. Now, you knew before then, too, did you not? You knew, as a matter of fact, from the telegram from the Bank of America itself which says, "Wire" this bank "for the account of Pioneer Lumber Company"? That is that telegram of December 2nd. A. December what?

Q. It is dated December 2nd and received December 3rd, Exhibit 6.

A. We received that telegram.

Q. Then, you knew then, did you not, that the Bank of America was representing the Pioneer Lumber Company?

A. We did at that date and we had also had a telegram [107] from the Bank of America asking for funds covering the first car on November 29th, in which they made no mention of who they were representing.

Q. It was sent from that bank, that is correct, and which you received on December 1st?

A. Received November 29th.

Q. No. That was the date of it and you received it December 1st. Look at the bottom of that telegram.

A. I don't have the telegram. I am just looking at my notes. It has been put in the file as an exhibit.

Q. It is Exhibit 5. May I state, then, that that is what it so says, I note.

A. We paid the funds requested on this, in that wire, on November 29th.

Q. It is dated November 29th and received December 1st, that is correct, isn't it? Doesn't it so state on the telegram?

A. That is the date that is stipulated on there.

Q. Yes. And then you also received this other telegram dated December 2nd, received December 3rd, and that telegram stated "For the account of Pioneer Lumber Company," from the Bank of America, both telegrams from the Bank of America, and you knew at that time that the Bank of America was Pioneer's bank representative, is that correct?

A. At that second date. [108]

Q. And the payments were made—may I have the photostatic copies of the checks? And the checks from the Cleveland to your own bank were dated November 29, 1947, and December 5, 1947, that is correct, is it not?

A. That is correct.

Q. And those funds were thereafter transmitted by your bank in Cleveland to the Bank of America at Eighth and Vermont Street here?

A. That is correct.

Q. Now, you also knew that on November 19th, by virtue of a telegram from the Allied to Cleveland, Exhibit 4, that the Bank of America was Pioneer's bank and representative?

A. Pioneer and the Bank of America are referred to in this telegram. [109]

Q. No, that isn't the question. Whether you were dealing with us is a question for the court to determine. I am asking you. You can say yes or no. Did you know at that time, did the Cleveland Lumber Company know on November 19th or November 20th that the Bank of America here in Los Angeles were representing the Pioneer Lumber Company? You can answer that yes or no.

A. I can't answer it properly yes or no. We knew that they were representing them in this transaction.

Q. All right. And you testified you got the bill of lading from the bank which was sent to your bank in Cleveland? A. That is right.

Q. Then, you also received a telegram from the Pioneer's bank, did you not? I mean these telegrams from the Pioneer's bank.

A. They were from the Bank of America.

Q. That is right, and then there was also a letter by you, through your attorneys, served upon by the Pioneer's bank, was there not? That is the letter that is dated—offered for identification.

A. What was your question about this letter?

Q. That letter was served upon the Pioneer Lumber Company [110] by your attorney, was it not? A. That is correct.

Q. I am referring to document for identification No.—

The Clerk: That is Defendants' Exhibit A.

Q. (By Mr. Scholz) (Continuing): —Defendant Pioneer's Exhibit A.

The Clerk: Defendant Pioneer.

The Witness: Letter dated February 19, 1948.

Mr. Scholz: Yes.

The Clerk: For identification.

Mr. Scholz: That is right.

Q. You received no other bills of lading outside of that one that was offered in evidence, is that correct, Mr. Beaumont, in regard to this transaction? A. Not to my knowledge.

Q. You stated in response to a question by your attorney that you are willing to deliver the lumber upon the payment of the amount that you paid for the lumber, is that correct? Do I state it correctly?

A. The amount I paid and charges.

Q. And charges, is that correct?

A. That is correct.

Q. Your position is, now, that you are holding that lumber for the benefit of Pioneer and Allied Company, both?

A. We are holding it for the Pioneer—Allied and [111] Pioneer.

Q. That is right, for the benefit of the Allied and Pioneer.

A. For the benefit of Allied, whom we paid our money to.

Mr. Scholz: Will it be stipulated, Mr. Johnston, that you advised me that the lumber is being held for both the benefit of the Allied and Pioneer?

Mr. Johnston: It will be so stipulated. Will you give the date of that?

Mr. Scholz: Yes. That is in response to a question of mine.

Mr. Johnston: The date of the letter that you have in your hand there?

Mr. Scholz: Yes, July 9, 1948, in response to a query from me to Mr. Johnston July 6th as to whose benefit the lumber was being held Mr. Johnston stated for the benefit of both Allied and Pioneer. Is that correct?

Mr. Johnston: That is correct. [112]

* * *

The Witness: In which line is this statement made?

Mr. Scholz: That is what I am going to find. They made an extract, a copy for us. Yes, paragraph 2, "Answering paragraph 3 of said amended complaint the defendant admits that plaintiff paid defendant said sum of \$16,808.05 as agent for co-defendant Allied Lumber Company." That is correct, is [160] it?

The Witness: I would like to read it, if you please.

A. That is right.

Mr. Scholz: That is correct.

Q. And did you state in your answer—you may look at it further, if you wish—that the lumber was to be Grade A and Air Dried?

A. Where will that be in here? Will you tell me what paragraph it is?

Q. You have got the file. I can't.

The Clerk: You can step over there.

Mr. Seay: I submit that the answer is there and it speaks for itself.

Mr. Scholz: I think so, too. In this conjunction, I will offer the answer of Mr. Bandy in evidence at this time.

The Court: Admitted. There is no objection.

The Clerk: It will be marked defendant Allied's Exhibit H in evidence.

(Said answer of defendant Bandy to amended complaint was marked Defendant Allied's Exhibit H in evidence.) [161]

* * *

Mr. Seay: Well, at this time, your Honor, I think so far as the defendant Pioneer is concerned, the proof fails to state a cause of action against the defendant Pioneer Lumber Company and C. L. Bandy.

Now, there has been certain testimony injected in here by insinuations that the Allied shifted the cause of action or the transaction over to the Pioneer. However, we are not trying the case pending between Allied and Pioneer in this lawsuit. That case is still pending. The court has denied the Allied's motion to consolidate, and by striking that evidence which doesn't apply in this case, I think a judgment should be for the defendant at this point, the defendant Pioneer. [194]

I don't believe there is any connection of a cause of action shown by the evidence at this time. All the evidence indicates, which has been produced so far, and shows that the Pioneer was acting as agent

for the Allied in covering this order. Now, there is a question of whether the judgment should go against the principal or the agent, and I contend that there is no proof to tie this defendant as a principal.

The Court: What have you to say?

Mr. Johnston: Your Honor, it is not necessary to tie this defendant, that is, Pioneer, in as a principal in an action of this character, an action of rescission. Rescission may be had and restitution ordered against any party to the transaction who receives consideration, knowing of a fact that a warranty has been breached or knowing of the fact that a representation has been made. Assuming for the sake of argument that Pioneer is an agent, Pioneer participated in the wrongdoing here to the extent that Pioneer invoiced lumber that was admittedly green lumber, as dry lumber. Pioneer received the consideration that was paid for dry lumber, having participated in the sale of green lumber.

Pioneer was fully aware of the fact that this lumber that was shipped to Cleveland did not meet the requirements, and I submit Pioneer was guilty of fraud, but whether fraud is established or not, that is not necessary to our case. All that is necessary to hold Pioneer is the fact that [195] Pioneer received the consideration or a part of the consideration paid for green lumber when that lumber was supposed to be air dried. Pioneer received that

money, knowing of the facts and now should be compelled to restore the consideration.

The Court: Under the pleadings and the evidence so far and the principle of law applicable, the motion will be denied.

You may proceed.

Mr. Scholz: If your Honor please, I also have a motion. This is a motion to elect upon behalf of the plaintiff. There is considerable law upon this.

The Court: Yes, there is.

Mr. Scholz: And I have quite a number of authorities and probably Mr. Johnston and Mr. Seay have also quite a number of authorities, but just briefly, to bring before your Honor my motion, which is a motion to elect, to require the plaintiff to elect whether they will proceed against the Pioneer or Allied, I call your Honor's attention to *Craig vs. Buckley*, 218 Cal., page 78, and let me read briefly from some of the points in that case. I think that I can put that point better in that way than I can in oral argument.

"The rule upon this subject is well settled that while the plaintiff may bring the action against both the agent and the undisclosed principal, he may not have judgment against [196] both, but before the close of the case, must elect whether he will take judgment against the one or the other. This rule, however, is subject to an exception, or modification, which holds that the right to compel an election is waived by failure to demand or move for that remedy during the course of the trial." Then citing cases.

The case just cited was followed by the Supreme Court of California in a recent decision, wherein is found the following statement of law:

“It is contended that where suit is brought against an agent and the undisclosed principal is joined, the plaintiff must prior to the judgment elect to hold one or the other. This is undoubtedly the rule, and it is fully discussed in the recent case of *Klinger v. Modesto Fruit Co., Inc.*, *supra*, but it was there held also that the principal who desires to take advantage of the rule must raise the point in the trial court by demurrer, motion or otherwise; and that a failure to demand such an election in the lower court constitutes a waiver of the right. There is no evidence in the record of such demand and the point is therefore not well taken.”

So, your Honor, my own opinion is that we should make the motion, now, and that I don't want to proceed to tell the court what to do, but take it under advisement and dispose of it at the conclusion of the case, but I want to preserve our rights and have the record show that we do, at this time, at the finish of the case as far as the plaintiff is concerned, make this motion and that we will also make the motion at the end of the case unless your Honor would be agreeable that it be deemed that we make that motion at the end, too, to save time.

The Court: The court reserves ruling on this motion at this time and you may proceed, and it will be disposed of in the final determination. [198]

Q. Well, do you know that the Pioneer instructed the Bank of America, Eighth and Vermont Street, to forward the [230] bills of lading to Cleveland and the invoices, provided that they paid for it, do you know that?

A. I didn't know it until I got here.

Q. Do you know it, now?

A. I know it now. [231]

* * *

Q. (By Mr. Scholz): Mr. Davis, what is your occupation? A. Banking.

Q. You are the branch manager of the Bank of America, Eighth and Vermont Street, Los Angeles, California? A. Yes, sir.

Q. And how long have you been in that bank?

A. You mean in that Bank of America branch?

Q. Yes. A. Ten years, 11, 11 years.

Q. And during that last ten years you had business dealings [239] with the Pioneer?

A. Yes, sir.

Q. You are now having business dealings with the Pioneer? A. Yes. [240]

* * *

Q. May I refresh your memory by showing you Plaintiff's Exhibit, I think it is 6, 5 and 6. Now, Plaintiff's Exhibits 5 and 6 are copies of telegrams sent by the Bank of America to the Cleveland Lumber and Door Company, are they not?

A. Yes, sir.

Q. Now, you sent those wires to the Cleveland Lumber and Door Company pursuant to instruc-

tions received from the Pioneer Lumber Company?

A. That is right.

Q. The instruction from the Pioneer Lumber Company was that the Cleveland Lumber and Door Company was to pay to your bank, for Pioneer Lumber Company, this amount of money? [241]

* * *

The Clerk: Marked Plaintiff's Exhibit No. 31 in evidence.

(Said document so offered and received in evidence was marked Plaintiff's Exhibit No. 31.) [254]

* * *

Q. Now, calling your attention to defendant Allied's Exhibit Q, the letter dated December 8, 1947, which reads in part as follows:

"Enclosed you will find our cashiers check #3059020 for \$811.58, which is your commission on car #SL&SF—", number so-and-so.

Now, were you instructed by Pioneer to insert the word "commission" in there?

A. No, sir. Just a matter of speech is all it is.

Q. And you don't know whether——

A. Whether it is commission or not commission.

Q. (Continuing): ——whether Pioneer is the agent of Allied or the principal of Allied?

A. I don't know as they have any connection other than as that telegram released.

Q. In other words, when you used the word "commission," you were picking a word out of the air, as a matter of fact?

A. That was just a matter of assuming that it was that and sent it.

Q. But you did not know what the legal relationship was, nor you don't know now, between Pioneer and Allied?

A. No, nor do I know, now, only from what I have heard right here.

Mr. Johnston: I have no further questions of this witness. [255]

Mr. Seay: No questions.

Examination

By Mr. Scholz:

Q. Mr. Davis, on the examination by myself, you stated that all funds were paid to Pioneer and then I think you truthfully corrected it.

A. That is right.

Q. And correctly stated that you paid all the funds to Pioneer excepting the amount which you forwarded to the Allied Lumber Company. Is that correct? A. Yes, sir, that is correct.

Q. And the amount which you forwarded to the Allied Lumber Company is the amount which is set forth in Allied's Exhibit Q, is that correct?

A. Yes.

Q. That was the amount? A. Yes.

Q. And all the other amount was paid to Pioneer Lumber Company?

A. There wasn't any other amount.

Mr. Scholz: Now, wait a minute.

The Witness: That figures out the amount that we got from them.

Mr. Scholz: Wait a minute. This is——

The Witness: Oh, I understand what you mean.

Mr. Scholz: I don't want to get you off wrong.

The Witness: Yes.

Mr. Scholz: This only figures out \$811.58——

A. That is right. I see what you mean.

Q. ——and \$772.52.

A. Yes, the balance.

Q. And that is what you forwarded to the Allied Lumber Company, what you stated as commissions and the balance was paid to the Pioneer?

A. Yes, sir, that is right.

Mr. Scholz: We all agree on that. That is all.

* * *

(Said letter so offered and received in evidence was marked Defendant Allied's Exhibit I.)

Q. (By Mr. Scholz): And then you received the order from Cleveland Lumber and Door Company, dated 10-3-47, that is, that is the date of the order, and it was one order—well, they are both dated 10-3-47—it refers to order No. 1249 and order No. 1250.

A. Yes, we received those.

Q. And these are the original orders that you received? A. That is right.

Mr. Scholz: I offer them in evidence as one exhibit, I guess, or you can make it two.

The Court: Admitted.

The Clerk: Defendant Allied's Exhibit S in evidence, they both being marked the same.

(Said documents so offered and received in evidence were marked Defendant Allied's Exhibit S.)

Q. (By Mr. Scholz): And I call your attention to this paragraph here that is stated in print, "Freight net cash, and balance less 2% for cash 10 days from delivery, or 60-day note from date of invoice." A. Right.

Q. And then there is typed up in above there, "Terms: 1% 10 days from arrival"——

A. Yes. [273]

Q. (Continuing): What is your interpretation of that statement?

Is that permissible?

Mr. Johnston: I don't think—oh, he might state what his understanding of it is, I suppose.

The Court: All right, he may state it.

The Witness: My understanding is that the 1% superseded the 2%, as we were not in the habit of allowing 2%, but, if the payment was made in the time given, we would allow a 1% discount; if not, that there would be a further period of time in which it was to be paid on net basis.

Q. (By Mr. Scholz): You mean that if they paid in 10 days after arrival, they would get 1% off? A. That is right.

Q. Or they would have 60 days from the date of invoice? A. That is right, yes.

Q. And this in ink here "Please Rush All Possible," was that written on there at the time you received the order?

A. Yes, as far as I remember, it was.

Mr. Johnston: May I see the ink statement on there?

Q. (By Mr. Scholz): Now, you acknowledged receipt of this order from the Cleveland Lumber and Door Company, did you not? A. Yes. [274]

Q. On October 14, 1947?

A. That is right.

Q. And you said, "All conditions outlined will be complied with"? A. Correct.

Mr. Scholz: I offer that in evidence.

Mr. Cashin: It is the same as Exhibit 3.

The Court: Admitted.

Q. (By Mr. Scholz): Then I hand you here-with a letter from the Pioneer Lumber Company, dated October 21, 1947, being defendant Allied's Exhibit K for identification, and ask you if you did not receive that letter.

A. Yes, we received the letter.

Q. And that letter in brief confirmed their statement that they could furnish one to two million feet air dried or kiln dried lumber? That is not a complete statement. It is just to identify it.

A. Yes.

Mr. Scholz: I offer that as Allied's Exhibit K.

The Court: Admitted.

The Clerk: That is the Defendant Allied's Exhibit K for identification and is marked Defendant Allied's Exhibit K in evidence.

(Said document so offered and received in evidence was marked Defendant Allied's Exhibit K.) [275]

Q. (By Mr. Scholz): I also hand you herewith a carbon copy, what purports to be a carbon copy, from Allied Lumber Company to Pioneer Lumber Company, dated October 2, 1947, referring to order No. 10359, to which is attached a supplement to that order and referring to order No. 10359, and ask you if that is the exact copy which you sent to Pioneer Lumber Company, and I refer now to Defendant Allied's Exhibit O for identification.

A. That is an exact copy of the original as transmitted.

Q. And also for Allied's Exhibit P for identification?

A. The same answer.

Mr. Scholz: I offer that in evidence, then.

The Court: Admitted.

The Clerk: Marked Defendant Allied's Exhibit O in evidence and Exhibit P in evidence.

(Said documents so offered and received in evidence were marked as Defendant Allied's Exhibits O & P.)

Q. (By Mr. Scholz): And then I hand you herewith a copy of a letter which is Plaintiff's Exhibit No. 26, I believe in evidence, dated October 9, 1947, in which the Pioneer acknowledged receipt of the order No. 10359 and that "All conditions as outlined in your letter and appearing on the order are applicable and will be complied with." And you received that letter? [276]

A. The letter, as I remember it, is that this is a copy, counsel. It appears to be exactly the same as

the original that I remember receiving, that the would comply with it.

Q. Well, is there any question in your mind or would you prefer to see the original letter?

A. I think I should see the original, if I may.

Mr. Scholz: All right. May I see the original letter of October 9th from Pioneer? I think that is Plaintiff's Exhibit 26. That is a copy, too. Have you got the original letter? No, no. We would have it.

The Witness: If your Honor please, may I answer that question again?

The Court: Yes.

The Witness: Since I know that all your copies in those files were obtained from originals given by me to you, I would answer that that is a correct copy of the original.

Mr. Scholz: All right. Then I offer that——

Mr. Cashin: Here it is, Mr. Scholz.

Mr. Scholz: Oh, yes, here it is. (Mr. Scholz shows document to the witness.)

The Witness: Yes, this was received.

Q. (By Mr. Scholz): The same thing?

A. Yes.

Mr. Scholz: Then I offer this in evidence. Not this [277] one.

The Clerk: You are offering this as a defendant's exhibit, also?

Mr. Scholz: Yes.

The Court: Admitted.

The Clerk: Defendant Allied's Exhibit T in evidence.

(Said document so offered and received in evidence was marked Defendant Allied's Exhibit T.)

Q. (By Mr. Scholz): And then I show you a letter, Pioneer's Exhibit L in evidence. This is a copy of that Exhibit L—— A. Yes.

Q. ——and ask you if you received that letter sent by Pioneer to yourself.

A. Yes, I did receive that letter.

Q. Now, in that letter there, it says:

"I showed Dukes some siding at one of our shipping points. It just happened that no Kiln Dry was being loaded at that time. However, he did see the pattern 400 shorts, which are Kiln Dry and bone dry. He was in a hurry to leave, and I was in a hurry to get rid of him because he was looking for siding dried down to 700 pounds as shown in the Redwood Association Book. We do not have time to dry it to that extent, if we did, the cost would be prohibitive. Our Kiln Dry weighs from 900 to 1,000 pounds. Air Dry from 1,000 to [278] 1,200 pounds. You can imagine what facilities would be needed to completely dry from one to three cars every day.

"We would like to point out a few facts concerning this item. It is manufactured from special stock selected over a long period of time for its fine texture, and thoroughly dried by air and kiln down to 700 pounds in its rough state. This will be the

first running of this item since before the war. It is impossible to manufacture such a finished product from the ordinary run of redwood not properly cured. It takes an average of 180 days from the time this stock is selected to get it in proper condition for milling. We now have $11\frac{1}{2}$ million feet and will start milling when we receive orders for the first 200,000 feet, the equivalent of two carloads. We can promise car numbers and shipment within a very few days after orders are received.

"Please note that the detail has not been scratched out as in the general run of so-called combed products, instead, it has been perfectly milled. The samples sent to you are truly representative of the entire milling.

"Due to the tremendous scarcity of good interior finish, we feel that the present 12 carloads will not be with us long, now that our customers have seen the samples.

"Its main uses would be for dens, dining rooms and living rooms, in fact the entire interior of a house; also, for certain outside finish or complete siding. It absolutely cannot [279] be beat for office interiors.

"It is all $\frac{3}{8}$ " x 6", 8 to 20 feet long; short pieces 10 to the bundle; long pieces 8 to the bundle, A Grade and Btr.," (Better) "and Better, perfectly clear. Guaranteed not to exceed 800 pounds shipping weight. Carloads average 100,000 feet to the car and can be loaded with $\frac{1}{2}$ car of Bevel siding. Price: \$130.00 per" thousand, "surface measurement" I guess that is, "MSM."

A. Yes.

Q. (Continuing): "——F.O.B. Los Angeles."

Now, did you receive that letter?

A. Yes, I did.

Q. Did that have any connection with this particular deal here?

A. Not that I know of. It refers to a Mr. Dukes from South Carolina.

Q. Now, I hand you herewith a letter from the Pioneer Lumber Company, dated October 25th. Well, I don't think that is—you mean you want it in?

Mr. Johnston: I can't tell. Let me see it.

(Mr. Scholz hands document to Mr. Johnston.)

Mr. Johnston: It does not make any difference. I don't want it in. I don't want any of this in. I think it is all cluttering up the record.

Q. (By Mr. Scholz): I hand you herewith a copy of a letter [280] dated November 5, 1947, which is in evidence. Have you the exhibit number? Have you that one of November 5th? I want to show it to the witness. It is a letter from Pioneer to Allied.

Well, I offer it in evidence.

I hand you herewith a copy of Plaintiff's Exhibit 27, from Pioneer to yourself, and did you receive that?

A. Yes.

The Clerk: Are you offering yours?

Mr. Scholz: Yes, I offer mine in evidence.

The Court: It will be admitted.

The Clerk: Defendant Allied's Exhibit U in evidence.

(Said document so offered and received in evidence was marked Defendant Allied's Exhibit U.)

Q. (By Mr. Scholz): Now, refreshing your memory from this letter, which is Defendant's Exhibit U in evidence, that in brief refers to the Pioneer demanding money in advance for the shipment of lumber to Cleveland, does it not? A. Yes.

Q. Prior to that time, Pioneer had agreed to send the shipment to Cleveland upon the terms that Cleveland had set forth in their order to you, is that correct?

Mr. Johnston: Wait a minute.

Mr. Scholz: It is in evidence.

Mr. Johnston: Will you state that again? [281]

Mr. Scholz: Mr. Reporter, will you read the question?

(Pending question read by reporter.)

Mr. Johnston: Had agreed with you, that is, Pioneer, is that what you meant to say?

Mr. Scholz: Yes.

Mr. Johnston: Very well.

The Witness: Yes.

Q. (By Mr. Scholz): Now, this changed that original order, did it not? A. It did, yes.

Q. In what respect?

A. In that it changed the terms of payment.

Q. In other words, how did it change the terms of payment?

A. Well, originally, the order was to be delivered in the regular course of business, whereby we were to be billed per our instructions, so that we in turn could bill the consignee, and after receiving the money from the consignee we would have transmitted the purchase price at that time to the supplier, Pioneer. Having requested speeding up of funds by telegraph, we thought we couldn't comply with it because it changed the original arrangement that we had with the buyer.

Q. And then what did you do then?

A. We communicated with not only this particular buyer, but later with others—I guess that is not relevant—stating [282] that the terms of payment had been changed and asked for approval to allow those changes.

Q. I hand you herewith what purports to be a wire from McGuire, Cleveland Lumber and Door Company, to Estcourt, Allied Lumber Company, dated November 19, 1947, and ask you if that was in response to a wire which you had made to—strike that question. I will get it in order.

Pursuant to this letter from Pioneer to yourself, dated November 5, 1947, did you then contact Mr. McGuire of the Cleveland Lumber and Door Company as to whether or not that would be agreeable with them?

A. To the best of my recollection, there was a conversation between me and Mr. McGuire at about this time in the middle of November, in which we discussed the matter of supplying this material, that we had made arrangements with Pioneer to

supply this material and that the original arrangement as to payment couldn't be complied with; therefore we were in the position of acting as a go-between, because we couldn't make arrangements—change the arrangements of the people who had agreed to purchase this lumber from us and under the original arrangement—therefore, in this case I revealed to Mr. McGuire the setup that we had with Pioneer, that we were originally buying it from them and were going to resell it, as we couldn't supply dry lumber ourselves, we had offered green, and were very glad to have obtained a source of [283] dry lumber, but we couldn't enter into an arrangement whereby we were coming in the middle and handling phone calls, and this and that, back and forth all the time; we felt that it would be best that the shipper and the buyer would deal directly with one another, and that we would obtain a commission on the material, which was the difference between the price they had originally quoted to us and the price we had quoted to the buyer.

Q. (By Mr. Johnston): What did McGuire say?

A. Mr. McGuire told me at that time, and I believe it has been testified to before, that he was very surprised that anyone should require telegraphic funds from the firm such as Cleveland Lumber and Door, with which fact I agreed, it didn't seem to me to be an essential fact, but since that was the only terms upon which the lumber could be supplied, they would agree to it, as is evidenced

by the telegram, providing that their 1 per cent discount could be protected, which we said that it could and if the Pioneer wouldn't absorb the 1 per cent, we would.

Q. That is, they agreed to the transmission of telegraphic funds?

A. That is right. I believe there are two wires to that effect, or one.

Q. (By Mr. Scholz): Now, on or about that time that you [284] had this conversation with Mr. McGuire, did you also advise him by wire, that is, McGuire—it is stipulated that Mr. McGuire is the vice president of Cleveland?

Mr. Johnston: Oh, yes.

Q. (By Mr. Scholz, Continuing): Did you also advise him by wire, and I call your attention to Plaintiff's Exhibit 4?

A. Yes, the wire of November 19th, in which we said that we could make no other arrangements except to have the telegraphic funds made and asked them to arrange it.

Q. That was to Pioneer?

A. This wire was to Cleveland.

Q. No. I mean the funds to Pioneer?

A. Yes.

Q. That they required?

A. That is right.

Q. In other words, "Our Supplier Pioneer Lumber Requires Telegraphic Funds Presentation Bill Lading Bank America Los Angeles."

A. Right.

Q. "Appreciate Your Advising Your Bank Accept And Advise Us Name Your Bank. Regret Cannot Arrange Other Terms."

That is the wire you sent?

A. That is it. [285]

Q. And then in addition to this and your telephone conversation with Mr. McGuire of the Cleveland Lumber and Door Company, did you receive a wire in reply to your wire which has just been offered in evidence? What was that one there?

The Clerk: The date? That is Plaintiff's Exhibit 4.

Mr. Scholz: And then in response—strike the rest of it out, will you, Mr. Reporter? I will reframe that question:

Q. In response to your wire to Cleveland, to McGuire, Cleveland Lumber and Door Company, of November 19th, which is Plaintiff's Exhibit No. 4, you received a reply back from McGuire, dated November 19th, that is, dated in Cleveland November 19, 1947, as follows:

"Rewire Okay To Ship Car Provided Car Cash Discount Covered Per Order Our Bank Union Bank of Commerce Cleveland."

A. Yes, that wire was sent.

Q. "F. T. McGuire Cleveland Lumber And Door Co." A. Right.

Mr. Scholz: I offer this as defendant's exhibit next in order.

Mr. Cashin: That was Exhibit B.

Mr. Scholz: Oh, yes, Exhibit B. It was Exhibit B for identification. Mark that B. [286]

The Court: Admitted.

The Clerk: Defendant's Exhibit B for identification is marked Defendant Allied's Exhibit B in evidence.

(Said document so offered and received in evidence was marked Defendant Allied's Exhibit B.)

Q. (By Mr. Scholz): I believe you stated that the Cleveland had no objection, so far as you know, to this arrangement.

Mr. Johnston: Wait a minute. He did not state any such thing at all.

Mr. Scholz: I am sorry, I did not hear it.

Mr. Johnston: He stated that Mr. McGuire raised no objection to telegraphic funds.

The Court: Do you object?

Mr. Johnston: I do object, your Honor.

The Court: Sustained.

Mr. Scholz: All right.

Q. Now, what other conversation did you have with Mr. McGuire of the Cleveland Lumber and Door Company, if you recall?

A. The original conversation was in the——

Q. I mean in regard to this change in the order, by which payment was to be made before the lumber was received.

A. There was no further conversation specifically with regard to that payment phase of it, so far as I remember. [287] There was a later one——

Q. Now, have you given the conversation which you had with Mr. McGuire on or about November 19th, to the best of your recollection?

A. Yes. I say it was somewhere in that period. Exactly, I don't remember.

Q. And was there any mention in there, in that conversation, about that Pioneer would pay your commission, nevertheless, and that you——

Mr. Johnston: Just a minute. I object to the question. It is leading in form.

The Court: Sustained.

Q. (By Mr. Scholz): Was there any mention in there about commission, in your conversation?

Mr. Johnston: Just a minute. It is a leading question. Ask him what the conversation was—in fact, you have already asked him and I think he has answered it.

The Court: Sustained.

Q. (By Mr. Scholz): Now, is there anything further in that conversation with Mr. McGuire of Cleveland Lumber and Door Company, on or about November 19th, that you recall at this time?

A. Nothing other than what I have said, that I recall.

Q. Now, after these arrangements were made in regard to the payment for the lumber by Cleveland to Pioneer, did [288] you hear anything further in regard to that matter?

A. In regard to the payment?

Q. No. With regard to the matter.

A. With regard to the matter, I believe there shipped, that is all.

Q. And they asked you to hurry? By that I was a notification of the cars which had been

mean Cleveland, prior to this, had asked you to hurry the shipment?

A. There had been constant urging, not only on the part of Cleveland, but by others, to hurry up the shipment. We had been promised 10-day deliveries on these things, to start with.

Q. Then, after notification of the car being shipped, did you hear anything further from this matter?

A. Nothing until I got a notification by telephone, I believe around December 11th, from Mr. McGuire, that the cars were wetter than hell. May I correct that answer in just one point: There was one part about the receipt of the payment in the bank. That is, one other connection in regard to those cars, that I omitted to mention.

Q. Oh, yes. Let us go back, then. Did the Allied Lumber Company have any dealings whatsoever with the Bank of America, Eighth and Vermont Street, Los Angeles, prior to the receipt of the funds Cleveland had sent to it in this matter?

A. No. Only a request for a credit report through our [289] bank.

Q. Well, from your own bank, with credit report? A. Yes.

Q. And they had no dealings with them whatsoever at all?

A. Not that I remember of, no.

Q. After the funds were received by the Bank of America, Eighth and Vermont Street—or, did

you have any knowledge of how those funds were to come in to the Bank of America, Eighth and Vermont Street? A. No, sir.

Q. Then, after, as you testified here, the Bank of America received the funds from the Cleveland Lumber and Door Company, did you receive any communication?

A. There was a communication advising that some funds had been received for these cars, in our name, and asking for a release. In fact, I think there was a request for a blanket release, and I replied to that in the wire which has already been put into evidence, that the funds would be released, less a certain figure.

Q. In other words, you had no control over those funds, you were not entitled to those funds excepting your commissions?

A. That is right.

Q. Now, you stated that on or about December 11th you [290] heard from Mr. McGuire of the Cleveland Lumber and Door Company, saying that the lumber was wet. A. Yes.

Q. Now, referring to this copy of this letter—I don't know whether it is in evidence—of December 11, 1947, did you then have any conversation with Mr. Bandy and Mr. Matjasic?

A. I called them immediately I got the call from Mr. McGuire and telling them that there was an error in specification, that the cars had been ordered "Airdry" and the consignee had said they apparently were not dry as requested, and that I

brought it to their attention immediately for disposition and/or adjustment, which we of course held Pioneer responsible for.

Q. Well, let me read the letter. We have it here. Oh, yes. Wait a minute. That was a telephone conversation? A. That is right.

Q. And then you confirmed it with that, a letter, the same thing? A. Yes.

Q. And addressed to the Pioneer Lumber Company? A. Yes.

Q. And that is the letter? I mean this is a copy of the letter?

A. That is a copy of the letter. [291]

Mr. Scholz: Then, I offer this in evidence as Defendants' exhibit next in order.

Mr. Johnston: May I see it? Has that been put in? I am going to object to that as not binding upon the plaintiff in this action. It is a matter between Pioneer and Allied.

Mr. Scholz: We don't quite think so. We think it is a matter between all three of them. Of course, your Honor has not read the letter. Would your Honor wish to see the letter?

The Court: You can state the contents of it.

Mr. Scholz: The contents are simply this: This is a letter to Pioneer Lumber Company:

"We refer to our conversation of today with Mr. Bandy and Mr. Matjasic relative to the following cars of bevel siding shipped to Cleveland Lumber and Door Company.

"I C 37703 shipped November 29, 1947

“S. L. and S. F. 149239 shipped December 1, 1947.

“We were advised by telephone today by the consignee that these cars apparently are not Air Dry as requested. We have been asked to bring this to your attention immediately for disposition and/or adjustment for which we, of course, shall hold you responsible. After talking to you we have asked by wire that the waybills and requested adjustment be forwarded directly to you.

“We trust that this will be handled promptly and satisfactorily. [292] We are indeed sorry that such a contention has arisen as we value highly the business and goodwill of this customer, as well as desiring all our transactions with them and you to be on a smooth plane.

“Will you please keep us advised on this matter.”

The Court: How is that connected with the plaintiff?

Mr. Scholz: The connection with the plaintiff is in this way: We were advised, in other words Cleveland Lumber and Door Company advised Allied that apparently the cars were not air dried.

The Court: Well, it may be received. Objection overruled.

The Clerk: Defendant Allied's Exhibit V in evidence.

(Said document so offered and received in evidence was marked Defendant Allied's Exhibit V.)

Q. (By Mr. Scholz): Now, you note in this

letter which you wrote, Mr. Estcourt—you wrote that letter yourself, did you not——

A. Yes, I did.

Q. ——it refers to “After talking to you” (This is Pioneer) “we have asked by wire that the waybills and requested adjustments be forwarded directly to you.” What did that have reference to, that conversation that day?

A. When I talked to Mr. Matjasic at that time, he said that he couldn’t understand why the cars were not up to specification, [293] he didn’t have the waybills or bills of lading or anything in front of him and he would have to check into it, but he assumed that they had been sent already to Cleveland, so I said I would get hold of Cleveland and ask them to send either the waybills or copies, so that we could have some definite weight information as to what was in those cars and either prove Cleveland’s contention that it was wrong or Pioneer’s contention that it was right. The reply to that wire brought forth a moisture test, too, which I transmitted to Pioneer.

Q. And at the same time you sent this letter, you sent a wire to McGuire, Cleveland Lumber and Door Company, did you not?

A. Yes, I believe I did. I think it is there.

Q. And I hand you herewith what purports to be a copy of a wire addressed to Mr. F. T. McGuire, Cleveland Lumber and Door Co., reading as follows:

“Refer conversation siding sincerely regret ma-

terial apparently not as represented to us. Just contacted Pioneer Lumber 862 South Catalina Los Angeles. They cannot explain but request you forward immediately waybill test results and your desires for adjustment which they will conclude directly with you. Appreciate your keeping us advised we will cooperate all possible agreeable just conclusion."

You sent that wire? [294]

A. I sent that wire.

Mr. Scholz: I offer that in evidence, then, as defendant's exhibit next in order.

The Court: Admitted.

The Clerk: Defendant Allied's Exhibit W in evidence.

(Said document so offered and received in evidence was marked Defendant Allied's Exhibit W.)

Q. (By Mr. Scholz): Now, in response to that wire (Mr. Scholz shows document to Mr. Johnston), you received the wire from Cleveland Lumber and Door Company, McGuire, dated December 13th, is that correct? A. Yes.

Q. Now, this wire of December 13th states as follows:

"Re Wire Redwood Siding Inspection First Car Indicates Stock Dead Green We Cannot Use Under Any Circumstances Must Therefore Insist That Other Disposition Be Made Both Cars We Are Drawing Sightdraft on Pioneer Lumber Co for Entire Amount Paid in Advance by Ourselves

Kindly Urge Them to Honor Our Bank Very Much Disturbed and Contacting Their Bank This Morning.”

Q. That is the wire you received?

A. That is right.

Mr. Scholz: I offer that in evidence as Allied's Exhibit next in order.

Mr. Johnston: Let me see that. [295]

Mr. Cashin: That is Plaintiff's Exhibit 13.

The Court: Admitted.

The Clerk: This is defendant Allied's Exhibit X in evidence.

(Said document so offered and received in evidence was marked Defendant Allied's Exhibit X.)

Q. (By Mr. Scholz): Now, you sent copies of those wires to Pioneer Lumber Company, is that correct?

A. Yes, I did.

Q. And you sent a letter of transmittal dated on December 15th?

A. Yes.

Q. And the letter of December 15, 1947, which you sent, states as follows:

“We enclose herewith copies of wires just received from Cleveland Lumber and Door Company. These are for your information and we ask that you make disposition as requested.”

Is that correct?

A. That is correct.

Mr. Scholz: I offer that in evidence as defendant's exhibit next in order.

The Court: Admitted.

The Clerk: Your Honor, that has already been admitted as Exhibit G. [296]

The Court: If it is in evidence, there is no need of admitting it again.

Mr. Scholz: Well, all right, then.

Q. Now, did you ever hear anything from Cleveland after you sent that wire or a copy of those wires, until 12-16, 1947?

The Witness: I am sorry, I did not quite get the question.

Q. (By Mr. Scholz): Did you hear anything from Cleveland—I mean did you hear anything from Pioneer in response to the communications you sent to them?

A. I don't believe there was any response other than the telephone conversation there between myself and Matjasic, or myself and Bandy, offering \$5.00 a thousand adjustment.

Q. Mr. Bandy has testified you had a conversation on the 12th or 13th and then he refreshed his memory and he said the 10th or 11th. Did you have any conversation with Bandy between the 10th and 13th of December, outside of the one you have mentioned here?

A. The only one I mentioned there was the one in which we passed on Cleveland's complaint originally that the thing had not been received promptly. There was one later conversation, I believe it was about the 17th.

Mr. Scholz: May I interrupt you.

Q. Now, I want to ask you this question, now: I show [297] you a copy of telegram that went to Pioneer Lumber Company. Did you send the orig-

inal of this telegram, dated 12-17, 1947, to the Pioneer Lumber Company?

A. Yes. The copy is in my handwriting.

Mr. Scholz: I think that is Plaintiff's Exhibit 29 in evidence. This telegram reads as follows:

"Pioneer Lumber Company"——

The Clerk: Here.

Mr. Scholz: That is it.

"Refer Matter Cleveland Cars. They Advise Moisture Content 55% Lumber Not as Specified by You. Consignee Cannot Use. Please Advise Immediately Disposition You Want Made."

You sent that?

A. Yes.

Q. Now, you hadn't received any communications from Pioneer, from the time you sent the copies of the wires, except that telephone conversation, up to the time you sent this telegram?

A. Not that I remember, no.

Q. And then, on December 17th, you stated you had a telephone conversation with either Mr. Bandy or Mr. Matjasic, is that right?

A. Yes.

Q. Do you recall which one it was?

A. No. I am sorry, I don't. It was probably Matjasic. [298]

Q. And what was the sum and substance of that conversation?

A. I called, in an effort to find out what was being done with regard to concluding this matter, and the quick summarization of it was that they were willing to offer a settlement of \$5.00 a thou-

sand to adjust the difference in freight because of the added weight in the car, which I said was not at all acceptable in my mind because it wasn't a question of adjusting freight charges to anyone, it was a question of not shipping what had been asked for, but that I would transmit such information to Cleveland and let them decide what they wanted to do, at the same time recommending that they not accept it.

Q. And then, did you send this wire to McGuire, Cleveland Lumber and Door Company, dated 12-17, 1947?

A. Yes. It is a carbon, in my handwriting.

Mr. Scholz: I offer that in evidence. It is already in?

Mr. Johnston: That is in evidence, I think.

The Court: Admitted.

The Clerk: Defendant Allied's Exhibit Y in evidence.

(Said document so offered and received in evidence was marked Defendant Allied's Exhibit Y.)

Q. (By Mr. Scholz): Which telegram states:

"Retels Sorry unable phone yesterday. Assure you doing [299] everything reach satisfactory disposition. Will advise promptly. Pioneer offers five dollar thousand adjustment. Will reject unless you advise contrary. Is there any basis you can accept cars? Appreciate air mail letter giving full explanation conditions. Bank apparently refused your draft because we agents. Working on this."

You sent that telegram?

A. Yes.

Q. And in response to that you received this letter dated December 18, 1947?

A. That is right.

Q. And in which they stated, briefly, that the \$5.00 was not acceptable and that they thought that you, along with them, had been victims of circumstances?

A. That is right.

Mr. Scholz: I think that is in evidence already, isn't it?

Mr. Johnston: Yes.

Mr. Scholz: What is that exhibit number?

Mr. Johnston: Plaintiff's Exhibit 18.

The Court: We will recess for 10 minutes.

(Whereupon a short recess was taken.)

The Court: You may proceed.

Q. (By Mr. Scholz): I hand you herewith a copy of a telegram to Pioneer Lumber Company, dated 12-24, 1947. It [300] states:

"Refer Correspondence 2 Cleveland Cars. Have Cars Been Moved and Refund Made to Cleveland Lumber and Door? Appreciate Your Advising Status Immediately."

Did you send that wire?

A. I sent that wire. That is my handwriting.

Q. Did you receive any response to that?

A. There was a response at the end of the month, I believe there was a letter, to the effect that they would make no adjustment on it.

Q. That is the response, the letter dated December 30th?

A. I think that is the date, my remembrance of the evidence earlier.

Q. And that reference to Gaynor in that letter was with reference to another suit?

A. Another suit.

Q. And that referred to air dried or kiln dried lumber? A. Kiln dried.

Mr. Scholz: Now, I offer this in evidence as defendant's exhibit next in order.

The Court: Admitted.

The Clerk: Defendant Allied's Exhibit Z. [301]

(Said document so offered and received in evidence was marked Defendant Allied's Exhibit Z.)

Q. (By Mr. Scholz): And then I show you herewith a letter from the Allied Lumber Company to Pioneer Lumber Company dated January 20, 1948, which has been marked Defendant Allied's Exhibit E for identification, and ask you if you sent that letter? A. I did.

Q. And that letter states, in brief, just part of it—I don't want to read the whole thing:

"Has the lumber shipped been returned to you or is it under your control?"

"Is the statement of Cleveland Lumber and Door Company as to the lumber not being according to specification of the contract true or not?"

Did you receive any reply to that letter?

A. No.

Mr. Scholz: I offer this in evidence as Defendant's Exhibit E.

The Court: Admitted.

The Clerk: Defendant Allied's Exhibit E for identification, marked Exhibit E in evidence.

(Said document so offered and received in evidence was marked Defendant Allied's Exhibit E.)

Mr. Scholz: Now, there is a letter here from Mr. Johnston to the Pioneer Lumber Company, dated February 19, 1948, [302] for purposes of identification. Have you got that?

The Clerk: What number?

Mr. Scholz: Do you recall that?

The Clerk: Plaintiff's exhibit? What was the date?

Mr. Scholz: February 19, 1948.

Will you stipulate that that go in evidence?

Mr. Johnston: Yes, certainly.

Mr. Scholz: If your Honor please, then I offer in evidence a letter from Mr. Johnston, attorney for the Cleveland Lumber and Door Company, to Pioneer Lumber Company, dated February 19, 1948, which in part states—I better read the whole letter:

“Pioneer Lumber Company

“862 South Catalina Street

“Los Angeles 5, Calif.

“Re: Cleveland Lumber and Door Co.

“Gentlemen:

“As you know, we represent Cleveland Lumber

and Door Company. We are, by this letter, reciting certain facts which we have previously made known to you.

“On or about Oct. 3, 1947, you furnished Cleveland Lumber and Door Co. two carloads of redwood bevel siding. This siding was to be supplied in accordance with certain specifications. Before delivery you drew upon, and were paid by, Cleveland Lumber and Door Company in the sum of approximately \$17,000. On inspection the lumber was found [303] to be not in conformity with specifications and useless.

“We have heretofore made demand upon you for return of the purchase price and have requested your instructions as to disposition of the siding. The total amount of The Cleveland Lumber and Door Company’s claim is as follows:” and then naming certain figures, and then the last, concluding paragraph:

“We have no alternative other than that of bringing suit against you for the amount of Cleveland Lumber and Door Company’s claim.”

This is a letter addressed to Pioneer Lumber Company, dated February 19, 1948, and I offer that.

The Clerk: Are you offering this as an exhibit?

Mr. Scholz: Yes.

The Court: What is the number of that exhibit?

Mr. Scholz: It is Defendant Pioneer’s Exhibit A for identification, and I am offering my copy as Allied’s Exhibit AA.

The Clerk: The next number, your Honor, is AA.

The Court: What?

Mr. Scholz: AA, I think, your Honor.

The Court: It may be received.

The Clerk: Defendant Allied's Exhibit AA in evidence.

(Said document so offered and received in evidence was marked Defendant Allied's Exhibit AA.) [304]

Q. (By Mr. Scholz): Mr. Estcourt, did the Pioneer Lumber Company ever tell you, either before they shipped the lumber or after they shipped the lumber, or ever state to you in any way, that the lumber they shipped to Cleveland was green?

A. No.

Q. You are positive of that?

A. Absolutely.

Q. Did they ever state to you, either before or after, or at any time other than in this court, which was not to you, but other than in this court, that there was an error made on the invoices?

A. No.

Q. I believe you stated that you—and I rather rudely interrupted you—that you did state that you had a conversation with either Mr. Bandy or Mr. Matjasic on December 17th?

A. Yes.

Q. I think Mr. Bandy stated he had a conversation with you on the 12th or 13th and then he changed it to the 12th or 11th, in which he stated you were mad, was that correct?

A. I think——

Q. I presume by "mad"—we will use the colloquialism meaning that you were angry?

A. That is right.

Q. Were you angry at that time? [305]

A. Evidently I was.

Q. And did he at that time state to you that the lumber was green? A. No.

Q. He did state, at that time, he offered to make an adjustment to Cleveland at \$5.00 per thousand?

A. At that time, you mean the 11th or the 17th?

Q. No. I am talking about December 17th.

A. At that time, at the December 17th, it is my recollection that it was in that conversation that he offered to make the \$5.00 adjustment to Cleveland.

Q. And why were you angry at that time?

A. For two reasons; one, that there had been such a gross departure from the specifications as given originally and as confirmed and promised by them, and secondly, that after making such a gross departure they would have the effrontery to offer a \$5.00 adjustment on the freight in the hope that somebody would take it.

Q. By that gross departure you mean referring to what?

A. By shipping green instead of air dried.

Q. Did Pioneer tell you that that was green up to that time?

A. No. I assumed that it was green from the report that we had from Cleveland.

Mr. Scholz: That is all. [306]

Cross-Examination

By Mr. Seay:

Q. Now, Mr. Estcourt, in the conversation that you had with Mr. Matjasic prior to the time the order was filled, did he inform you that he had a shipment of two cars going to the Elliott Lumber Company in Illinois? A. No, he did not.

Q. And when was the first time you heard about these two cars going to Elliott Lumber Company?

A. The first time I heard that these particular cars were originally destined to Elliott Lumber Company, you mean?

Q. Yes.

A. It was when I saw the copies of the bills of lading or invoices from Hammond in my counsel's office.

Mr. Scholz: When was that?

The Witness: Oh, it must have been in the middle of this year, July, 1948.

Q. (By Mr. Seay): And Mr. Matjasic never at any time told you that he could divert orders from Elliott Lumber Company to Cleveland?

A. No. The question of diversion never entered into our conversation. The original understanding I had was that the cars were being loaded for them, that is, Pioneer, and that as they were loaded, they designated the consignee or [307] the destination point, and we were waiting continually for cars to fill the orders which we had placed with them. There were a number of car numbers given which were retracted later, but I knew nothing of the

fact that they were being loaded for other people and then diverted.

Q. Did you ever receive the car numbers on these specific shipments?

A. I received these two car numbers which have been entered in evidence, yes, by phone.

Q. And you transmitted those numbers to Cleveland?

A. I said those numbers were on their way, yes.

Q. Are you saying at this time, now, that Matjasic did not tell you, prior to the shipment of this order, that they did not have any dry material?

A. No. He never has stated that they did not have any dry material, to me.

Q. And in this letter that he read to you a few minutes ago, you received that letter, in which he stated that the conditions were such that they couldn't meet specifications of the Redwood Association?

A. It is which letter?

Mr. Scholz: I suggest that you show the letter to the witness so that he may know which letter you are talking about.

Mr. Seay: I am sure he knows the letter. [308]

The Witness: I am sorry. I don't. I would like to see the letter.

The Court: Show him the letter.

Mr. Seay: I will strike that question, then, your Honor. It is taking up too much time as it is.

Q. Now, you made a remark at the opening part of your testimony, when you were called back, that

Mr. Bandy and Mr. Matjasie came to you seeking raw lumber or raw redwood to use in filling their orders? A. That is right.

Q. And, as a matter of fact, you at that same time or subsequent to that agreed to furnish them raw lumber to fill their orders with, is that right?

A. We would agree to furnish them when we received specific orders from them for certain materials, which we never received.

Q. And you never furnished them with any orders? A. No. We did not.

Q. And they told you at that time that they were having difficulty in obtaining raw material to fill the orders with?

A. They said at the time they first came to me they were having difficulty in obtaining redwood to fill their orders.

Mr. Seay: I believe that is all. [309]

Cross-Examination

By Mr. Johnston:

Q. Mr. Estcourt, is the Allied Lumber Company a corporation incorporated under the laws of the State of California? A. Yes, it is.

Mr. Johnston: May I have Plaintiff's Exhibits 1, 2, 3 and 26, please, and 25?

Q. Now, Mr. Estcourt, I show you Plaintiff's Exhibits 1 and 2, which I understand to be the orders that your company received from the Cleveland Lumber and Door Company, reading in part as follows:

“Carload $\frac{5}{8}$ x 8 A and Better Thoroughly Air Dried——” A. That is right.

Q. And may I call your attention also to Plaintiff's Exhibit 3, which is a letter dated October 14, 1947, appearing over your signature. I take it that is your signature. A. That is my signature.

Q. (Continuing): “We acknowledge receipt of your orders numbers 1249 and 1250 for which we thank you. All conditions as outlined will be complied with.”

Now, pursuant to the receipt of that and after the receipt of that, you forwarded to Pioneer your Order No. 10359 which has been introduced into evidence as Plaintiff's Exhibit No. 25? Will you examine that and see if that is the—— [310]

Mr. Scholz: May I suggest this, that he take the original order? I think that the original order is different.

Mr. Johnston: If you will find it for me.

Mr. Scholz: Yes. It is different than the copy. I think some part has been left out of the copy. Anyway, I want him to use the original. I think that part of this was left out.

Mr. Johnston: I am interested in your order No. 10359.

Q. (Continuing): Now, calling your attention to Defendant Allied's Exhibit O, which appears to be identical insofar as I can determine with Plaintiff's Exhibit No. 25, calling your attention to De-

fendant Allied's Exhibit O, I will read you a part of that order:

"2 Carloads 5/8" x 8" 'A' and better grade, air dry bevel siding;" that was an order you placed with Pioneer, wasn't it? A. That is right.

Q. And in that order to Pioneer, you omitted therefrom the word "thoroughly" as appears in the order to you people from Cleveland, is that correct?

A. I think I can—that is correct, but I would like to explain why that was omitted and how. You will note that this order No. 10359, Allied's, is dated October 2nd, which was written as a result of the conversation with Mr. McGuire ordering these two cars, to me by phone, and giving me these [311] two order numbers 1249 and 1250, which was dated October 3rd, which was subsequent to our order, which was by a phone conversation. These were not in our hands in the ordinary course of mail until about October 5th or 6th. The first one, this one had been written prior to that as a result of the phone conversation.

Q. I see. And did you then intend to correct your order No. 10359 to conform to Cleveland's order No. 1250?

A. No, because I didn't consider it was necessary to change it because this stated air dry and the pattern and the amount and that the Redwood Association's specifications should apply.

Q. But you made no demand upon or gave no

instructions to Pioneer to furnish thoroughly air dried?

A. No, because I felt that the word "thoroughly" was redundant.

Mr. Johnston: I move to strike "I felt that the word 'thoroughly' was redundant" from the witness' answer.

The Court: It may be stricken.

Q. (By Mr. Johnston): Do you remember what time of the day it was that you had the telephone conversation with Mr. McGuire on November 19th, that you testified to on direct examination?

A. I did not testify to November 19th. It was approximately that time and I feel that the time was some time between [312] 11:00 and 2:00, because that was when the calls usually came through due to the difference in time of day.

Q. That is 11:00 a.m. to 2:00 p.m.?

A. Two here, yes.

Q. Are you able to fix the date of that, now?

A. No, I am not able to fix the date of that now.

Q. I show you this—I think I have overlooked one piece of correspondence between Allied and Cleveland. This appears to be a telegram dated December 12th addressed to McGuire, Cleveland Lumber and Door Co., Estcourt, Allied Lumber Company, appearing to be the sender, and ask you if that telegram was sent by you?

A. Whether this is a true copy or not, I don't know, but I believe my counsel already introduced the copy which I sent of this wire, Mr. Johnston.

Mr. Johnston: I would like to offer this in evi-

dence, your Honor, as Plaintiff's Exhibit next in order. I don't believe it has gone into evidence. If it has, I withdraw my offer.

The Witness: I believe there was one in my handwriting, a carbon copy of that.

Q. (By Mr. Johnston): Now, Mr. Estcourt, in regard to this telephone conversation, you place it, I take it, on or about November 19th?

A. About mid-November, yes. [313]

Q. Did Mr. McGuire call you?

A. I do not remember whether it was a call from him to me or from me to him. There were a number of calls involved in this thing.

* * *

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 6th day of April, A.D., 1949.

/s/ THOMAS B. GOODWILL,
Official Reporter.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 47, inclusive, contain the original Amended Complaint for Rescission and for Money Had and Received; Answer of Cecil L. Bandy, etc., to Amended Complaint; Answer of Allied Lumber Company to Amended Complaint; Motion to Consolidate; Order Denying Motion to Consolidate; Opinion; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Statement of Points to be Relied Upon on Appeal and Praecipe for Preparation of Record on Appeal which constitute the record on appeal to the United States Court of Appeals.

I further certify that my fees for preparing and certifying the foregoing record amount to \$1.60 which which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 31st day of January, A.D., 1949.

EDMUND L. SMITH,
Clerk,

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12172. United States Court of Appeals for the Ninth Circuit. Allied Lumber

Company, Appellant, vs. The Cleveland Lumber and Door Company, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed February 1, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 121 72

THE CLEVELAND LUMBER AND DOOR
COMPANY,

Appellee,

vs.

ALLIED LUMBER COMPANY,

Appellant.

STATEMENT OF POINTS TO BE RELIED
UPON UPON APPEAL

The appellant, Allied Lumber Company, a corporation, desires and adopts as its points on appeal the statement of points appearing in the transcript of the record, to wit, the statement of points to be relied upon upon appeal which were filed in the

District Court of the United States for the Southern District of California, Central Division.

/s/ RUDOLPH J. SCHOLZ,
Attorney for Appellant.

A copy of the foregoing motion was mailed by registered mail on February 24, 1949, to Newlin, Holley, Sandmeyer and Tackabury, 1020 Edison Building, Los Angeles, California, Counsel for the Appellee.

/s/ RUDOLPH J. SCHOLZ,
Attorney for Appellant.

[Endorsed]: Filed Feb. 24, 1949.

[Title of Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF THE
PARTS OF THE RECORD TO BE PRINT-
ED UNDER THE SUPERVISION OF THE
CLERK OF THE NINTH CIRCUIT COURT
OF APPEALS

Comes now Allied Lumber Company, a corporation, appellant in the above cause, and designates to be printed, pursuant to Rule 19 (6) of the rules of this court, the following parts of the record necessary for the consideration of Appellant's appeal from the judgment of the District Court, to wit:

1. Plaintiff's Complaint.
2. Defendant's Answer.

3. The transcript of the proceeds in the District Court, except that part thereof hereafter designated to be omitted, to wit:

(a) All of the reporter's transcript from beginning to Page 34, line 21.

(b) From Page 35, line 21, to Page 48, line 20.

(c) From Page 50, line 2, to age 64, line 21.

(d) From Page 67, line 8, to Page 70, line 2.

(e) From page 76, line 16, to Page 80, line 20.

(f) From Page 81, line 11, to Page 86, line 25.

(g) From Page 95, line 22, to Page 107, line 7.

(h) From Page 109, line 15, to Page 110, line 3.

(i) From Page 112, line 20, to Page 160, line 19.

(j) From Page 161, line 21, to Page 194, line 12.

(k) From Page 198, line 9, to Page 230, line 23.

(l) From Page 231, line 6, to Page 239, line 14.

(m) From Page 240, line 6, to Page 241, line 12.

(n) From Page 254, line 5, to age 254, line 25.

(o) From Page 257, line 11, to Page 272, line 25.

(p) From Page 314, line 5, to Page 325, line 6 (the end of transcript).

The printing of all original exhibits provided the Court approves the same.

Respectfully submitted,

/s/ RUDOLPH J. SCHOLZ,

Attorney for Appellant.

A copy of the foregoing designation was mailed by registered mail on April 18, 1949, to Newlin, Holley, Sandmeyer & Tackabury, 1020 Edison

Building, Los Angeles, California, Attorneys for Appellee.

/s/ RUDOLPH J. SCHOLZ,
Attorney for Appellant.

Docketed.

[Endorsed]: Filed April 18, 1949.

[Title of Court of Appeals and Cause.]

APPLICATION FOR ORDER TO DISPENSE
WITH PRINTING OF THE EXHIBITS

1. Appellant moves the court for an order to dispense with the printing of the exhibits in the printed record of this appellant, and to allow appellant and appellee to refer this court in the printed record, in the brief and in the oral arguments to the original exhibits, and as grounds therefor appellant states:

That the record prepared by the Clerk of the District Court and transmitted to this court as a record on appeal does or will contain all original exhibits for the inspection of this court.

There are approximately 49 original exhibits offered in this action. That as many of the exhibits were copied into the transcript by the reporter, and if any of them are not pertinent to the points on appeal, the printing of the original exhibits would result in duplication and unnecessary expense.

This application is made in the interest of economy.

/s/ RUDOLPH J. SCHOLZ,
Attorney for Appellant.

A copy of the foregoing motion was mailed by registered mail of February 24th, 1949, to Newlin, Holley, Sandmeyer & Tackabury, 1020 Edison Building, Los Angeles, California, Counsel for the Appellee.

/s/ RUDOLPH J. SCHOLZ,
Attorney for Appellant.

[Endorsed]: Filed April 29, 1949.

[Title of Court of Appeals and Cause.]

ORDER

Now on this date, the Court having read Appellant's application for an order to dispense with the printing of exhibits, and to permit appellant and appellee to refer this Court in the printed record, the Brief and the oral argument to the original exhibits, and for cause shown in said application;

It Is Ordered that the printing of all original exhibits be dispensed with in the printed record herein, and that appellant and appellee be allowed to refer this court in the printed record, the Brief, and in the oral argument to the original exhibits.

Dated April 26, 1949.

/s/ WILLIAM DENMAN,
Chief Judge, U. S. Court of Appeals for the Ninth
Circuit.

/s/ CLIFTON MATTHEWS,
/s/ WILLIAM HEALY.

[Endorsed]: Filed April 29, 1949.

[Title of Court of Appeals and Cause.]

APPELLANT'S AMENDED DESIGNATION
TRANSCRIPT TO BE PRINTED

Appellant, Allied Lumber Company, hereby amends and designates the following record to be printed on appeal in addition to the record heretofore set forth:

1. Findings of Fact and Conclusions of Law.
2. Judgment.
3. Opinion of Trial Court.
4. Notice of Appeal.
5. Statement of Points on Appeal.
6. Clerk's Certificate.

Dated May 25, 1949.

/s/ RUDOLPH J. SCHOLZ,
Attorney for Appellant.

STIPULATION

It is hereby stipulated that the Appellant's Designation of Record to be Printed may be amended to include the above.

NEWLIN, HOLLEY, SAND-
MEYER & TACKABURY,
Attorneys for Appellee.

[Endorsed]: Filed June 1, 1949.

ALLIED LUMBER COMPANY,
Appellant,
vs.
THE CLEVELAND LUMBER AND DOOR
COMPANY,
Appellee.

No. 12173
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

IRVING L. BURSTEIN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

JAMES M. CARTER,

United States Attorney,

ERNEST A. TOLIN,

Chief Assistant U. S. Attorney,

NORMAN W. NEUKOM,

Assistant U. S. Attorney,

HERSCHEL E. CHAMPLIN,

Assistant U. S. Attorney,

600 Federal Building, Los Angeles 12,

Attorneys for Appellee.

FILED
APR 30 1949

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No. 12173

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

IRVING L. BURSTEIN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

**Statement of Pleadings and Facts Disclosing
Jurisdiction.**

This appeal is from a judgment of conviction of the offense of mailing obscene matter on four counts, in violation of Title 18, United States Code, Section 334, said judgment having been entered by the United States District Court for the Southern District of California, at Los Angeles, California, on June 8, 1948. [Clk. Tr. 23.]

The defendant, and appellant herein, Irving L. Burstein, also known as Edward Reyer, Frank Miller and George H. Lane, was charged by indictment in Count One with having deposited for mailing, on or about April 22, 1947, in the United States Post Office in Los Angeles County, California, a book entitled "Confessions of a Prostitute" for delivery to H. Abbott, 1424 N. Gardner, Hollywood, California, said book being obscene, lewd, lascivious and filthy. [Clk. Tr. 2.]

In Count Two of said indictment, the defendant was charged with having deposited in the United States mails on or about April 10, 1947, a letter for delivery to P. Campeau, Los Angeles, California, said letter being entitled "Unusual Publications," and which disclosed information as to where, how and for how much a certain book "Confessions of a Prostitute" could be obtained, said book being obscene, lewd, lascivious and filthy. [Clk. Tr. 4 and 5.]

Counts Three and Four charged similar offenses to that charged in Count Two except that letter was mailed to R. MacFarland, San Fernando, California, on or about April 19, 1947 [Count Three, Clk. Tr. 6], and the letter in Count Four was mailed to E. N. Caldwell, Los Angeles, California, on or about April 22, 1947. [Clk. Tr. 7.]

A verdict of guilty as charged was returned by the jury on all four counts on May 20, 1948. [Clk. Tr. 21.]

It was further adjudged, on June 8, 1948, that the defendant be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of one year and one day on Count One, and like sentences were imposed on Counts Two, Three and Four, but the sentences on all four counts to run concurrently. It was further ordered that said concurrent sentences begin and run at the conclusion of the defendant's sentence in the United States Penitentiary, at Atlanta, Georgia. [Clk. Tr. 23 and 24.]

A Notice of Appeal from the above entitled judgment was filed by the defendant, and appellant herein, on June 17, 1948 [Clk. Tr. 25 and 26] to this Court which has appellate jurisdiction under Title 28, U. S. C. A., Sections

1291 and 1294(a). The United States District Court had jurisdiction under Title 28, U. S. Code, Sec. 41(2), and Sec. 3231 of Title 18, New U. S. Code; also, venue was in U. S. District Court for Southern District of California under Rule 18 of Federal Rules of Criminal Procedure.

Statement of the Case.

THE FACTS.

Since no statement of the facts has been set forth in Appellant's Opening Brief, the following summary of evidence pertinent to the questions before this Court is hereby submitted.

The appellant whose true name is Irving L. Burstein, as disclosed by him upon arraignment April 26, 1948, in the United States District Court for the Southern District of California [Clk. Tr. 9] resided in Los Angeles, California, during the month of April, 1947. In this period the publication called "Confessions of a Prostitute," together with three letters, were mailed to four separate parties who were in the vicinity of Los Angeles, California.

The book in question (Count One), "Confessions of a Prostitute," was mailed to H. Abbott, Hollywood, California, April 22, 1947. [Clk. Tr. 14, and Pltf. Ex. 1.] Defendant stipulated that he actually mailed said book, and left open to the jury the question of its obscenity.

The letters mailed to P. Campeau in Hollywood, California (Count Two), R. MacFarland, San Fernando, California (Count Three), and to E. N. Caldwell, Los Angeles, California (Count Four) were similar in their build-up and solicitation for the purchase of the book

"Confessions Of A Prostitute" and defendant's offer to mail it to them for the price of Five Dollars (\$5.00). In the first letter he signed his name as Frank Miller, 7904 Santa Monica Boulevard, Los Angeles, California [Pltf. Ex. 4], and in the latter two as George H. Lane, 633 South La Brea Avenue, Los Angeles, California [Pltf. Exs. 3 and 5].

Defendant stipulated with counsel for the Government that all names alleged in the indictment were, and are, the names used by him under which he, the defendant, operated and conducted his business, also that his true, full and correct name is Irving Burstein. [Clk. Tr. 14 and 15.]

In each of the three letters referred to above captioned "Unusual Publications," the defendant began with "Dear Friend," then went on to say he had a book to sell to mature and broad-minded men, but that it must not fall into the wrong hands. Thereupon, certain lines were quoted from the book in all three letters, to-wit:

" 'He went crazy when he saw my legs. He said they were perfect, he kept kissing them and running his hands over them. I knew he wasn't so young and had to get a thrill up. * * * He dumped me on the bed and almost killed me, he got right on top of me, I couldn't breathe hardly.' So, if you are a proper person for this type of literature, enclose a Five dollar bill with this letter, mail it in the enclosed envelope, and your copy will be dispatched promptly." [Pltf. Exs. 3, 4 and 5.]

Defendant was first indicted April 30, 1947. [Clk. Tr. 7.] The cause came on the calendar for arraignment and plea in the United States District Court, Southern District of California, on May 12, 1947. The case

was called and defendant did not respond, after which his bond was ordered forfeited; an alias bench warrant issued, and a new bond fixed in the amount of \$15,000.00. [Clk. Tr. 8.]

Defendant testified as his own witness and at his own request that he was taken before the United States Commissioner here who set bond, and after he was released on bond he went away, "very foolishly," and returned to New York. [Rep. Tr. 75.]

He testified further that he and his brother were arrested in New York in September 1940 on the same type of offense on which he was being tried here. He got out on bond and ran away by coming to California. [Rep. Tr. 70-74.]

He testified further that he had a prior conviction in 1940 in Atlanta, Georgia, for possession of a car which had been taken across a state line illegally. He was given a three year sentence after a plea of guilty. [Rep. Tr. 68.]

On or about July 21, 1947, the defendant was sentenced by the United States District Court for the Eastern District of New York to serve three years' imprisonment upon a similar charge. (Pltf. Op. Br. p. 1.)

On January 18, 1948, defendant requested Mr. Ray Kinnison, Assistant U. S. Attorney, Los Angeles, California, to arrange to have him removed to Los Angeles at once for trial on the indictment here in question. [Deft. Ex. H; Clk. Tr. 50.]

A Writ of Habeas Corpus *ad Prosequendum* was issued March 16, 1948, returnable April 26, 1948, as to the defendant by the United States District Court, Los Angeles, California. [Clk. Tr. 57.]

The defendant was arraigned in said Court April 26, 1948, was asked by the Court if he had counsel to represent him, to which he replied, "No, Sir; I don't. I would like to take care of it myself, with the Court's permission." [Rep. Tr. 2.]

The Clerk then informed defendant he was entitled to a trial by jury, and to be represented by an attorney, and if he did not have funds with which to employ an attorney, the court would appoint one for him, without charge. [Rep. Tr. 3.]

The Clerk asked defendant if he had funds with which to employ an attorney and he replied he did not. Again the Clerk inquired, "Do you desire an attorney, for the court to employ one for you without cost to you?" Again the defendant replied, "No Sir." [Rep. Tr. 3.]

At this point the Court said it thought it would be better that defendant have an attorney to represent him on this charge, and appointed Mr. George M. Wiener, who is a member of the California Bar. [Rep. Tr. 21.] A continuance was granted until April 28, 1948, at which time a plea of not guilty was entered as to all four counts, and the case set for trial for May 18, 1948.

On April 30, 1948, Attorney Wiener's Motion to Withdraw from the case was granted and he was discharged

except when needed by the Court. The defendant consented and waived the right to counsel. [Clk. Tr. 11.]

On May 18, 1948, defendant for the first time after a jury was called, but not impanelled, informed the Court he was not ready for trial and moved for a continuance, which was denied. [Clk. Tr. 12.]

After the Government rested, the defendant called as his first witness, Mr. George M. Wiener, the attorney who had been relieved as his counsel. In a statement to the Court before the witness testified, defendant said:

“I would like to tell your Honor and the jury that Mr. Wiener was appointed by Judge Beaumont to aid as my counsel, and we couldn't agree on the method of defense, and I asked the Judge to relieve Mr. Wiener of his obligation; and that was done. Now Mr. Wiener was very nice about offering to help in any way he could. I asked him to buy a copy of the book, of the original book this case is about.” [Rep. Tr. 21, 22, and Deft. Ex. A—“Sterile Sun” by Caroline Slade.]

Following his testimony, Mr. Wiener again consented to sit in with defendant to assist him in the case at the request of the trial court. [Rep. Tr. 26.] During a recess, and in the absence of the jury, a conference was held in the Judge's Chambers, wherein defendant reaffirmed his position to proceed with his own defense and Mr. Wiener clarified his position, and agreed to assist Burstein in any way possible. It was clear their theories of defense differed, and again defendant stated he didn't

think he should take up any more of his (Wiener's) time because he was not in a position to pay him. [Rep. Tr. 31, lines 11 and 12.] The Court explained what high calibre of men were recommended, endorsed and presented to the Federal Court by the Bar Association¹ and that pay was not an element here. [See Rep. Tr. 27 to 35, incl., for said proceedings in Chambers.]

The said defendant thereupon continued to try his own case *in propria persona*. He requested the Court to have two witnesses subpoenaed, which was done with assistance of Government counsel. [Rep. Tr. 36.]

After a verdict of guilty, and Notice of Appeal was filed, defendant proceeded *in forma pauperis* to perfect his appeal, having made an affidavit, reciting "That because of my poverty, I am unable to pay the costs of said suit or action or appeal or to give security for the same." [Clk. Tr. 27.]

At no time or place in the record did the defendant disclose possession of funds anywhere with which to employ counsel of his own choosing. He did not seek the process of the Court to obtain any funds whatsoever, if he had same. Never did he ask that other counsel be appointed to replace Mr. George M. Wiener, nor did he ever express a desire to obtain another attorney.

¹Mr. George M. Wiener was serving on the Los Angeles Bar Association Committee in Federal Court during the week defendant Burstein was arraigned, and was appointed.

Questions Involved.

- I. Whether or not defendant was denied a speedy trial as guaranteed by the Sixth Amendment to the Constitution?
 - A. Whether a defendant who is a fugitive from justice at the time of arraignment has any standing to complain of denial of a speedy trial?
 - B. Whether a defendant is precluded from asserting his right to a speedy trial by his own actions or conduct?
 - C. Whether it was reversible error to deny defendant's motion for a continuance at the time of trial?
- II. Whether or not defendant was denied the right to counsel as guaranteed by the Sixth Amendment to the Constitution?
 - A. Whether or not defendant waived his personal right to counsel in this case?

ARGUMENT.

Summary.

The appellant in this case bases his appeal primarily upon the premise that he was denied a speedy trial as guaranteed by the Sixth Amendment to the Constitution; second, that he was denied the assistance of counsel as guaranteed by the Sixth Amendment, and third, that the court committed an error in denying his continuance at the time of trial, at which time the appellant states now he was denied the use of his funds for the purpose of obtaining the services of an attorney of his choice, and therefore, was forced to trial without there being witnesses available in his behalf. In the review of the record in this case, the following salient facts stand out in bold relief. First, the appellant was indicted for this offense in the Southern District of California by the grand jury on April 30, 1947. The appellant appeared before the United States Commissioner, he has testified in his own behalf and was released after he posted bond. According to his own testimony at the trial, he very foolishly left the jurisdiction and returned to New York. At the time of arraignment on May 12, 1947, the appellant did not appear. His bond was forfeited, and a new bail was set at \$15,000, and a bench warrant issued by the District Court.

In the course of the appellant's testimony it must be observed that he admitted a similar offense in the State of New York in 1940, at which time he was arrested with his brother, and again he admitted on the witness stand that he did a very foolish thing, that is, by running away and coming to California, after posting bond. He further admitted a prior conviction in Atlanta, Georgia, in 1940,

for the possession of an automobile which had been illegally transported across a state line, and after a plea of guilty he was sentenced to three years' imprisonment.

The record further discloses that on July 21, 1947, this appellant was sentenced in the Eastern District of New York to serve three years' imprisonment. After conviction on a similar charge to the one on which he was tried in the present case, he was imprisoned in the Federal Penitentiary at Atlanta, Georgia, during which time he had considerable correspondence with the attorney for the bonding company in Los Angeles, namely, Mr. Thomas B. Sawyer. Letters between the appellant and Mr. Sawyer were introduced in evidence by appellant, and the discussion related mainly to a plea by appellant in another district court under Rule 20 of the Federal Rules of Criminal Procedure. The discussions disclosed the predicament of the surety company which desired to have the forfeiture of appellant's bond set aside.

The record further discloses correspondence between the appellant and Mr. Ray Kinnison, Assistant United States Attorney in Los Angeles, relative to having appellant's case disposed of at an early date. The United States Attorney for the district in which Atlanta, Georgia is situated, did not consent to a disposition of the case under Rule 20, and whatever consent had previously been indicated on the part of the United States Attorney for the Southern District of California was withdrawn. However, the correspondence from appellant to the latter office of the United States Attorney was dated in January, 1948. A writ of habeas corpus *ad prosequendum* was issued by the District Court here on March 16, 1948, returnable on April 26, 1948.

On the date of April 26, 1948, appellant was present for his arraignment, and stated that he did not desire counsel after the clerk informed him that he was entitled to an attorney of his own choosing at all stages of the proceedings. The clerk further told him that if he did not have funds with which to hire counsel, the court would appoint one for him, and he again stated that he had no funds, and further wanted to represent himself with the court's permission. He was advised by the court to accept the service of counsel, and consequently, Mr. George W. Wiener was appointed to represent him. This attorney was a member of the Los Angeles Bar Committee, who was present in court at the time of appellant's arraignment. Mr. Wiener had been a member of the California Bar since 1943, and the trial court explained to the appellant during a proceedings in chambers while the trial was in progress, that the Bar Association recommends and endorses to the Federal court outstanding attorneys to assist in the defense of those who have no funds with which to engage their own counsel.

After some disagreement on the theories of defense, this attorney asked the court to be relieved as appellant's counsel, to which the latter consented, and at no time did he request the court to appoint other counsel to replace Mr. Wiener. In a statement to the court and the jury during trial appellant stated that after said disagreement on the theories of defense, he himself has asked the court to relieve Mr. Wiener in order that he might conduct his own trial.

In the matter of funds, it must be noted in appellant's opening brief that he complains that he was denied access to private funds with which he could have engaged coun-

sel of his own choosing. This point is raised for the first time upon appeal, and at no time does the record disclose any mentioned of private funds or the need for the process of the court in obtaining same. Furthermore, it must be noted that appellant executed an affidavit on the 29th of October, 1948, in which he recites "that because of my poverty I am unable to pay the costs of said suit or action or appeal or to give security for the same." Pursuant to an order of the District Court, appellant was thereafter allowed to perfect his appeal *in forma pauperis*.

The case decisions herein reviewed or cited apparently hold without exception that the constitutional guaranty of assistance to counsel is a personal right that may be waived, provided the defendant does so intelligently and with the full understanding of his rights. As one District Court stated, a defendant is entitled to the appointment of counsel but the court is not bound to force counsel upon him. It is submitted that the record is packed in this case with evidence that appellant waived his right to counsel, and that he fully understood his rights in so doing. That he competently waived his right, and did so intelligently was a question for the trial court to decide, but in review it must be noted that appellant conducted his own trial, and was competent enough to prepare an appellate brief on his own behalf.

In the matter of a denial of a speedy trial, the decisions hold that one who is a fugitive from justice has no standing to question that he was denied a speedy trial. A further point is abundantly clear from the cases that one is precluded from asserting his denial of a speedy trial where by his own actions or conduct he has contributed to the delay. Examples of this are found in acquiescence to a long period of delay, as much as seven years in one

case, five years eight months in another, and lesser periods of time as indicated by decisions cited. The courts seem to hold that it is not the period of time alone that controls, but a question of demanding trial on the part of the appellant. A further refinement of the rule holds that a demand for trial must be made to the court of the district in which the indictment is pending, and if this motion for speedy trial is denied, and second remedy is open, that of a petition to the proper appellate court for a writ of mandamus. None of these things were done by the appellant in the present case. Therefore, it is submitted that by his own actions and by his becoming a fugitive from justice at the time of his arraignment in this district, he waived any rights he might have had and has no standing to complain thereof. It is immaterial that another jurisdiction took appellant into its custody, tried him and imposed the sentence which he was serving at the time he was returned to this district by a writ of habeas corpus *ad prosequendum* following his own request by letter to the Office of the United States Attorney here.

A third point is raised by appellant, namely, that the court committed error in denying his motion for a continuance at the date of trial. He recites in his brief that he had not been able to have witnesses available for his defense, and further, that the authorities in charge of the jail where he was in custody denied him the access to private funds with which to engage counsel. The record discloses that all of the witnesses requested by appellant were subpoenaed with the assistance of government counsel, and no other witnesses were requested after those whom he called had testified. Furthermore, the court explained to appellant in the course of trial that it was going a long ways in allowing him to offer evidence which otherwise might be hearsay or not material. An example

is given of the original book which was received in evidence over Government's objection from which appellant claimed he had extracted the parts which made up the publication entitled "Confessions of a Prostitute." The evidence did not show whether or not the original book entitled "Sterile Sun" was ever transported through the United States mails. This book was introduced as being a publication from a restricted list in the Los Angeles Public Library, said list being available only to ministers, attorneys, and social workers, or people of that class.

It must be pointed out further that appellant stipulated that he mailed the publication in question "Confessions of a Prostitute" as charged in the indictment, also that he mailed the three letters set forth in the three remaining counts to the persons as charged, and that he used the fictitious names other than his own true name in these transactions. Thus, his only defense was the question of obscenity of these publications, which was submitted to the jury, and on this point the jury has spoken in the affirmative.

It is submitted that no reversible error was committed by the trial court in the denial of said continuance. Every possible effort was made to accord the appellant a fair trial, and it is difficult to see how the result would have been different because of mere delay, since the jury had only one issue to determine regardless of the date of the trial. It must be observed that appellant had twenty days' notice between the time of arraignment and time of trial within which to prepare his case, and during which time he might have had the assistance of counsel had he not waived such rights. Upon appeal he now assumes two inconsistent positions; first, that he was denied a speedy trial; and second, that he was denied a continuance.

It is submitted that any delay in having his case disposed of was caused by his own actions or misconduct in becoming a fugitive from this jurisdiction, and that his right to counsel was fully preserved by the court, but that such right was waived in an intelligent and competent manner. The judgment should be affirmed.

POINT I.

The Appellant Was Not Denied His Right to a Speedy Trial as Guaranteed by the Sixth Amendment to the Constitution.

A. One Who Became a Fugitive From Justice From the Jurisdiction Which First Obtained Custody and Was Later Apprehended, Tried and Sentenced in Another District Is in No Position to Complain of Delay in Receiving a Speedy Trial in the District of Origin.

It was held in the case of *Hart v. United States* (C. C. A. 6, 1910), 183 Fed. 368 at 370 that where the defendant, in anticipation of his prosecution, escaped the vigilance of the marshal and was a fugitive from justice until a short time before he was put on trial, he could not be heard to say that he was denied the constitutional right to a speedy trial. (Writ of Certiorari Denied in 1911, 220 U. S. 609, 55 L. Ed. 608, 31 S. Ct. 714.)

In the case of *Shepherd v. United States* (C. C. A. 8, 1947), 163 F. 2d 974, that where delays have been caused by the accused himself they cannot be complained of by him. The right of the accused to a discharge for failure of the prosecution to give him a speedy trial is a personal one to him and may be waived. Where an accused becomes a fugitive from justice, he cannot demand a dis-

charge for the delay when the delay is the result of his own conduct. (Cases cited by the Court are as follows: *Phillips v. United States*, 8 Cir., 201 F. 259; *Pietch v. United States*, 10 Cir., 110 F. 2d 817, 129 A. L. R. 563; *State v. Swain*, 147 Or. 207, 31 P. 2d 745, 32 P. 2d 773, 93 A. L. R. 921.)

In the *Shepherd* case above, the defendant was arrested in 1943, was given a hearing before a United States Commissioner and was held for trial under a \$2,000 bond. He wrote a letter to the United States Attorney requesting trial. Up to that time no indictment had been returned against the defendant. He was released on bond, and the grand jury returned an indictment in 1944 after which the case was subject to trial, and notice sent by the United States Attorney to the surety directing him to produce the defendant for trial. The bondsman, however, was unable to produce the defendant. Following release on bond defendant went to another state, embarked on various ships in the Maritime Service, and was later court martialed for deserting an American ship in 1944. He was returned to the United States where he entered a plea of guilty in the United States District Court of another state, and was sentenced to three years on each count, the sentences to run concurrently. While a prisoner at Leavenworth Penitentiary in 1945, a writ of habeas corpus *ad prosequendum* was issued by the District Court directing that the defendant be taken from the penitentiary for trial on the first charge. No motion for dismissal was made of the indictment, but defendant entered a plea of guilty to each of two counts of the indictment returned by grand jury 1944. He filed an appeal, asserting that he had been denied the right of a speedy trial.

In reviewing this contention the Court stated that an accused has two remedies if he deems that he is not being given a speedy trial. His first remedy is to make a demand by a motion to the Court for such trial, and not by a motion to dismiss indictment on account of the delay. If a motion for trial should be denied, his further remedy would be to apply to an Appellate Court for writ of mandamus to compel trial.

In *Phillips v. United States, supra*, the court, speaking through the late Judge Carland, in referring to this question of procedure said [201 Fed. 262],

“Counsel for Phillips also moved the court to dismiss the case and discharge the defendant, because the United States had failed to bring him to trial at an earlier date. This motion was also overruled. The sixth amendment to the Constitution of the United States provides that the accused shall enjoy the right to a speedy and public trial; but the record does not show that Phillips ever asked for a trial during the four years that the indictment was pending, and we do not think a defendant can acquiesce in the postponement of his trial, and then, when the same is called, move that the case be dismissed because he had not been given a speedy trial. It is his duty, if he wants a speedy trial, to ask for it; and we must presume that he would have been granted an earlier trial if he had so asked. There was no error in the ruling of the court in this respect.”

In *Pietch v. United States, supra*, defendant was tried more than seven years after the termination of the transaction on which the indictment was predicated. The court, observing that defendant did not object nor protest to the

court respecting the delay, said (110 F. 2d 819, 129 A. L. R. 563):

“He filed a motion to dismiss the indictment on account of the delay, but the motion was filed more than three years after the return of the indictment, and it was a motion to dismiss—not a demand for trial. A person charged with a crime cannot assert with success that his right to a speedy trial guaranteed by the Sixth Amendment to the Constitution of the United States has been invaded unless he asked for a trial. In the absence of an affirmative request or demand for trial *made to the court*, it must be presumed that appellant acquiesced in the delay and therefore cannot complain.” (Emphasis supplied.)

In *Frankel v. Woodrough*, 8 Cir., 7 F. 2d 796, 798, the defendant was in the penitentiary serving a sentence. During the time he was so imprisoned he filed a motion demanding trial under the pending indictment against him. This demand having been refused, application for writ of mandamus was made to the court which sustained the application, thus indicating the proper procedure.

In discussing this problem the Court in the *Shepherd* case, *supra*, at page 978, had this further to say:

“Even if defendant might properly urge this question by motion to dismiss the indictment, such motion could not, in view of the undisputed facts, be sustained. At the first term of court at which defendant could have been tried he was absent from the jurisdiction of the court, a fugitive from justice, and remained absent until he was brought into the jurisdiction by writ of habeas corpus *ad prosequendum*. The right of a speedy trial is relative. It is not inconsistent with delays but depends upon circumstances

and here the delay is satisfactorily explained by the government. Defendant was brought to trial as soon as was reasonably possible and as said in *Frankel v. Woodrough, supra*. “* * * we think an accused would not be entitled to a discharge even though he were denied a speedy trial within the meaning of the Constitution.”

The Federal rule and the California rule appears to be the same on the question of whether or not the defendant can avail himself of the Constitutional guarantee of a speedy trial where he is a fugitive from justice. In the case of *In re Gere*, 64 Cal. App. 418 (1923), the Court had this to say:

“It is conceded that the constitutional guaranty of a speedy trial and the provisions of section 1382 of the Penal Code adopted in pursuance thereof do not operate in favor of a fugitive from justice. It must also be true that the law on this subject should not be permitted to work to the advantage of one whose arrest has been delayed because of his own wrong. In other words, one whose dissimulation, falsity, and deceit have been a contributory factor in the delay in the matter of his apprehension is in no position to complain that he was not arrested and his case not brought to trial within sixty days after the filing of the indictment or information. In such a case the constitutional and statutory right to a speedy trial would be available to him only after he had been taken into custody and the court had acquired jurisdiction to proceed with the trial.”

B. One Whose Own Action Delays Trial on a Criminal Charge Is Precluded From Invoking His Right Under This Amendment to a Speedy Trial.

It has been held in the case of *Daniels v. United States* (C. C. A. 9, 1927), 17 F. 2d 339, that five years is not a period of time sufficient to constitute a denial of the constitutional guarantee for a speedy trial. On page 344, this court had the following to say:

“No statute of the United States defines the time within which criminal accusations must be tried. In the absence of such a statute, it would seem that, if the accused fails in his efforts to bring the case on for trial, his only remedy would be to apply to an appellate court for mandamus. It has been so held. *Frankel v. Woodrough* (C. C. A.), 7 F. 2d 796. It is also held that one may not acquiesce in the postponement of his trial from time to time, and then insist on dismissal because he has been denied a speedy trial. *Phillips v. United States* (C. C. A.), 201 F. 259; *Worthington v. United States* (C. C. A.), 1 F. (2d) 154, certiorari denied 266 U. S. 626, 45 S. Ct. 125, 69 L. Ed. 475. Here the indictment was returned November 12, 1920, and the trial was had October 6, 1925. A demurrer was filed on December 11, 1920, and was submitted on February 11, 1922. It is not shown that at any time between the indictment and the trial effort was made by the defendant to expedite the case or to bring it on for hearing. We find nothing contrary to these views in *Beavers v. Haubert*, 198 U. S. 77, 25 S. Ct. 573, 49 L. Ed. 950.”

The *Daniels* case was cited with approval in *Pietch v. United States*, 110 F. 2d 817 on page 819, which case held that a defendant tried seven years after the transactions on which the indictment was passed was not an excessive period of time so as to constitute a denial of the right to a speedy trial. In that case the appellant by his own action or failure to act was precluded for the reason that he had not asked for a trial nor had he made a demand to the proper court, and thereby was presumed to have acquiesced in the delay, and therefore, could not complain thereof.

Again, the *Daniels* case was cited with approval in the case of *United States ex rel Hanson v. Ragen, Warden*, (C. C. A. 7, 1948), 166 F. 2d, page 608. In this case it was a question of a right to a speedy trial as guaranteed by both the United States Constitution and the State Constitution. The State's statute provided that an accused should be brought to trial within a certain time similar to the California statute referred to in the case *In re Gere, supra*. The Court said that under Federal case law the right to a speedy trial is relative and dependent upon surrounding circumstances, citing *Beavers v. Haubert*, 198 U. S. 77, 87, 25 S. Ct. 573, 49 L. Ed. 950. Further, it said if the petitioner's own action delays a trial he is precluded from invoking this right, citing *Daniels v. United States, supra*.

In the Supreme Court decision of *Beavers v. Haubert, supra*, the court lays down the general rule on page 86 of its decision as follows:

“undoubtedly a defendant is entitled to a speedy trial and by a jury of the district where it is alleged the offense was committed. This is the injunction of the

Constitution, but suppose he is charged with more than one crime, to which does the right attach? He may be guilty of none of them, he may be guilty of all. He cannot be tried for all at the same time, and his rights must be considered with regard to the practical administration of justice. To what offense does the right of the defendant attach? To that which was first charged, or to that which was first committed? Or may the degree of the crimes be considered? Appellant seems to contend that the right attaches and becomes fixed to the first accusation, and whatever be the demands of public justice they must wait. We do not think the right is so unqualified and absolute. If it is of that character it determines the order of trial of indictments in the same court.

* * * It must be remembered that the right is a constitutional one, and if it has any application to the order of trials of different indictments it must relate to the time of trial, not to the place of trial. The place of trial depends upon other considerations. It must be in the district where the crime was committed. There is no other injunction or condition, and it cannot be complicated by rights having no connection with it. The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice. It cannot be claimed for one offense and prevent arrest for other offenses; and removal proceedings are but process for arrest—means of bringing a defendant to trial.”

C. Denial of Appellant's Motion for a Continuance at the Date of Trial Was Not Reversible Error.

Where, a defendant states upon his arraignment that he desires no counsel, but the Court appoints competent counsel to assist him anyway, and they disagree as to the theory of trial, counsel is dismissed, and the trial is set twenty days later, defendant after such notice may not complain upon appeal that he was prejudiced when the Court denied his motion for a continuance, and has all witnesses requested by defendant subpoenaed into Court.

In the absence of a showing that a further delay would better enable him to prepare a defense, or in what regard he was prejudiced a defendant has no standing to complain on the one hand that he was not accorded a speedy trial, and on the other, that he was not granted a continuance after the date had been set for weeks, a jury called, and the Court ready to hear his case.

In the case of *Dansiger v. United States* (C. C. A. 9, 1947), 161 F. 2d 299, at page 301, this Court held that it was not reversible error for the Court to deny Danziger's motion for continuance to get depositions from England and other distant places, where the motion was made and denied but not renewed, and it was not clear that said depositions would have been material, or could have affected the result.

Where, as here, the trial court issued subpoenas for all witnesses requested by defendant, admitted hearsay evidence on behalf of defendant, and obtained further assistance of counsel for defendant, it cannot be urged that error was committed without a showing that a different or more favorable result would have followed from a continuance. Where defendant stipulated that he did in fact mail the publications in question and used the fictitious

names in his correspondence, and left the sole issue of the obscenity to the jury, how can he be heard to say the jury would have reached a different verdict at same later date because of mere delay?

In the *Danziger* case the Court again affirmed the rule that the constitutional guaranty of a speedy trial is a personal right which may be waived by a failure to assert it, citing *Collins v. United States*, 9 Cir., 157 F. 2d 409.

In this latter case, two years was held to be no denial of the constitutional guaranty to a speedy trial, since it is a personal right which is waived by failure of accused to demand trial. It is submitted that a motion for continuance by defendant here on the date of trial was a waiver of any right to a speedy trial he may have previously claimed, and that he lost same by assuming two inconsistent positions at the same time. The *Collins* case also cites the *Daniels* case, *supra*, with approval, as well as the *Pietch* case, above discussed.

In *Bayless v. United States* (C. C. A. 8, 1945), 147 F. 2d 169, it was held that trial five years and eight months after indictment did not constitute a denial of the right to speedy trial where defendant by his own action, entered a plea of guilty, was sentenced, and later released from Alcatraz upon a writ of habeas corpus, not having had assistance of counsel, and was thereafter promptly brought to trial on the original indictment. The Court said it is not the law that the mere lapse of such period of time between the commission of a crime and trial of indictment therefor establishes denial of a speedy trial within the intentment of the sixth constitutional amendment.

The point has been urged by the appellant that he made various attempts through correspondence with Attorney Sawyer and with the United States Attorney's Office in Los Angeles to have his case brought to trial at an early date. The record discloses that the United States Attorney in the District of Georgia did not consent to handle his plea under Rule 20, and subsequently, the consent of the United States Attorney for the Southern District of California consent was withdrawn. It must be observed that Rule 20 of the Federal rules of criminal procedure provides that a defendant arrested in a district other than that in which the indictment is pending may state in writing after receiving a copy of the indictment that he wishes to plead guilty or *nolo contendere*, and to waive trial in the district in which the indictment is pending, and consent to disposition of the case in the district in which he was arrested, subject to the approval of the United States Attorney for each district. Therefore, it follows that if consent of the United States Attorney for either district is not given there is no other alternative provided by Federal rules than to remove said defendant to the district of origin to either plead or stand trial. Furthermore, it must be observed that a plea of guilty or *nolo contendere* are the only pleas provided for in a foreign district under Rule 20. While it is not clear from the record what plea the defendant desired to enter in either the District of Georgia or the Southern District of New York, yet it is difficult to see with what conviction he urges this point now when in retrospect he entered a plea of not guilty

after being removed to the Southern District of California and insisted upon trial for the alleged offense.

In the case of *Fowler v. Hunter, Warden* (C. C. A. 10, 1947), 164 F. 2d 668, it was pointed out, as in other cases above cited, that an accused waives his right to discharge or to a dismissal of a prosecution by reason of the delays in bringing him to trial if he does not make a proper application therefor. The demand for trial must be addressed to the court in which the indictment is pending (and not to the United States Attorney or some third party attorney). Moreover, it has been held that an application for a writ of habeas corpus does not seek a trial, but that the remedy of a person charged with a crime who is not accorded a speedy trial, is to demand trial, and if the demand is not met, to apply to the proper appellate court for a writ of mandamus to compel trial.

A further point could have been raised by the appellant to the effect that sentences could not be imposed so as to commence at the expiration of a sentence which he was then serving. The Court in the *Shepherd* case, above cited, on page 978 answers this question by saying that this contention is wholly without merit. Cumulative sentences are permissible under Federal practice, citing *Blitz v. United States*, 153 U. S. 308, 317, 14 S. Ct. 924, 38 L. Ed. 725; *Howard v. United States* (6 Cir.), 75 Fed. 986, 991, 21 C. C. A. 586, 34 L. R. A. 509; and sentences on convictions during imprisonment may be expressly made to commence at the end of the existing imprisonment (*Ponzi v. Fessenden*, 258 U. S. 254, 265, 42 S. Ct. 309, 66 L. Ed. 607, 22 A. L. R. 879).

POINT II.

Appellant Was Not Denied the Right to Counsel as Guaranteed by the Sixth Amendment to the Constitution.

A. The Right to Have the Assistance of Counsel Is a Personal Right That Was Waived in This Case.

When a defendant is informed upon arraignment by the Court Clerk of his right to counsel at all stages of the proceedings, and he states in open court that he did not want the assistance of counsel but preferred to represent himself, such constitutes a waiver of his right to the assistance of counsel as was held in *Nivens v. Huspeth, Warden* (C. C. A. 10, 1942), 128 F. 2d 15.

Likewise, it was held in *Amrine v. Tines* (C. C. A. 10, 1942), 131 F. 2d 827, that the right to assistance of counsel is a "personal right" and may be waived, and if the accused is otherwise accorded a fair trial which embraces an opportunity to be heard after due notice, he cannot complain of the failure to have counsel for his defense.

In *Johnson v. Zerbst*, 304 U. S. 458, at 468, the United States Supreme Court said that where a defendant, without counsel, acquiesces in a trial resulting in his conviction and later seeks release by the extraordinary remedy of habeas corpus, the burden of proof rests upon him to establish that he did not competently and intelligently waive his constitutional right to the assistance of counsel.

The *Johnson* case, above, was cited for the general rule by this Court in *Harpin v. Johnston, Warden* (C. C. A. 9,

1940), 109 F. 2d 434 at 435. In addition, it was pointed out that the determination of whether there had been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused. It was there held that the record failed to show that defendant did not competently and intelligently waive his right to counsel, and that appellant failed to carry the burden resting upon him.

In the present case, it must be observed that appellant was competent enough to conduct his own trial *in propria persona* after counsel had been appointed by the Court for him, and relieved at the request of the appellant. It is self-evident that he has displayed an intelligent grasp of his situation by writing his own appellate brief which discloses a background of experience in court procedure. His conduct in open court refusing counsel, his failure to request appointment of another attorney after he disagreed with the first one appointed, were facts and circumstances all within the determination of the trial court as to whether appellant waived his right herein.

As this Court said in *O'Keith v. Johnston* (C. C. A. 9, 1944), 146 F. 2d 231 at 232, the

“lower court was in the best position to judge whether appellant intelligently waived his right to counsel. If the court feels that he understands he is waiving a right, it is not a jurisdictional imperative that he be presently reminded of it. (Citing *Michener v. Johnston*, 9 Cir., 141 F. 2d 171, 174.) To inform him of a

right which he knew and intelligently waived would have been a useless act.”

The Court further said that whereas the better practice (in a habeas corpus hearing) would be to record the fact of determination of proper waiver, still the failure to do so did not negative the fact that such a determination was made.

A waiver is ordinarily a relinquishment or abandonment of a known right or privilege. Waiver is a question of ultimate fact rather than of law. *Michener v. Johnston*, *supra*. That case was a habeas corpus proceeding following a plea of guilty, and the court did not fully advise the appellant of his rights to counsel. The cause was remanded because it was not clear whether the court below made a clear finding on waiver, or on what basis it may have been made. However, at page 175 this observation appears in the opinion:

“At the hearing below the court had opportunity from personal observation of the petitioner to weigh his credibility, to gauge his intelligence, and to judge fairly the measure and extent of his understanding of his rights as gleaned from his prior experience as well as what was told him. We would be reluctant to disturb a clear finding of waiver had such a finding been made.”

In the case of *O’Keith v. Johnston* (C. C. A. 9, 1942), 129 F. 2d 889 at 890, this Court said a waiver of counsel is usually to be implied from the appearance of an accused without counsel or his failure to request counsel.

That case was a habeas corpus proceeding after a plea of guilty, and the lower court had not informed appellant of his right to counsel. It was held that where the lower court found that he intelligently waived his right to counsel, it would have been a useless act to inform him of the existence of a right which he knew he had and which he thus had waived. Its performance was not required by the constitution, and its omission did not deprive the court of jurisdiction.

A fitting summary of the law as applied to the present case was made in *Scott v. Johnston*, 71 Fed. Supp. 117 at 121, where the District Court said:

“It is recognized that under appropriate circumstances the constitution requires that counsel be tendered; it does not require that under all circumstances counsel be forced upon a defendant, citing *Carter v. People of State of Illinois*, 67 S. Ct. 216, 91 L. Ed. 172, 329 U. S. 173.”

Furthermore, the right to assistance of counsel in a criminal case as guaranteed by the Sixth Amendment has reference to the court of first instance only, and does not relate to the right of appeal. *Thompson v. Johnston* (C. C. A. 9, 1947), 160 F. 2d 374.

Conclusion.

This is a case in which the evidence is abundantly sufficient to support the finding of the jury that the matter sent through the United States mails by appellant was obscene. The evidence is undisputed that appellant deposited such matter for delivery in the Post Office Establishment of the United States, and that appellant used various names other than his true name in connection with his business. The indictment was adequate and appellant had a fair trial. There was no reversible error committed by the Court in denying a continuance at the time of trial. The appellant clearly waived his personal right to counsel throughout the proceedings, and has no standing to complain that he was denied a speedy trial. There is no reason for setting aside the verdict, and no legal or sufficient cause for a new trial. Therefore, the judgment should be affirmed.

Respectfully submitted,

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No. 12173.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

IRVING L. BURSTEIN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

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JUN 22 1949

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No. 12173.

IN THE

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FOR THE NINTH CIRCUIT

IRVING L. BURSTEIN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

Supplemental Statement.

Appellant in his reply brief on page two stated his intention to raise new matter as ground for error which was discussed therein for the first time. A consent was given therein for the appellee to file a reply brief, with the approval of the Court, in answer to new issues not raised in the appellant's opening brief.

In the statement of the case, appellant objects for the first time to the alleged error committed by the trial court in its failure to stop the appellant in his testimony concerning previous convictions. It is admitted therein that this is a matter of record in that the defendant testified

voluntarily of his prior convictions and therefore it was justified in the government's statement of the facts.

Under point two of said statement of facts, lines 9-11, it was stated that the record does not show that appellant ever refused to be represented by counsel. It is stated on lines 17-19 that the record further shows that no offer of the appointment of other counsel was ever made by the trial court. Reference is made to pages 29 and 30 of reporter's transcript. In discussing the matter of counsel in chambers during a recess in the trial, the court said in the presence of defendant, government counsel and the attorney appointed by the Court.

“* * * While the defendant has stated in open court that you and he disagreed on proper defense to be put in this case in his behalf, he stated that he asked Judge Beaumont to be permitted to defend himself.

“It happens that sometimes when a lawyer disagrees with his client, the court then at that time would offer him the opportunity of some other attorney to serve upon appointment of the court.

“But, as you say now, he feels he could best defend himself in the case, without an attorney, that is his right. You cannot force an attorney on a defendant if he does not want him. He has that right and, under our laws, as I stated at the opening of the case, he has the right to defend himself without any attorney. * * * Of course, it is already before the jury that he prefers to defend himself. That is al-

ready there. * * * The defendant volunteered the statement, so the jury knows what the situation is, because the defendant advised the jury. So, with that state of the record, I do wish you could or would accept the appointment to assist him in whatever way you can and whatever assistance he might ask for."

On page 30 of said transcript, Mr. Weiner replied,

"I have already stated, your Honor, I can and I will. * * * Now, Mr. Burstein has definitely decided upon a course of preferring to proceed alone at the counsel table. If he wants to amend that position, I hold myself ready and, for the sake of the record, I reiterate I will assist him in whatever way I can."

Under point three of appellant's enlarged statement of facts, reference is made to the nature of the book here involved, the author's purpose in writing the book. It is argued under said statement of fact that Government's Exhibit "2," "Confessions of a Prostitute," which is the book under indictment here, had certain passages underlined in red pencil and that such was unfair and *prejudicial*.

Under the Summary of Argument, pages 7 and 9, the issue is raised for the first time by appellant in his reply brief as to the obscenity of the book in question and whether or not the trial court committed reversible error in its instructions on what matter is obscene within the meaning of the Statute.

Questions Involved.

1. Whether the Trial Court committed error in its definition of what constitutes obscene matter within the meaning of the statute?
2. Whether the Trial Court committed error in failing to restrain appellant from testifying as to prior convictions?
3. Whether the Court committed error in regard to underlines contained in Plaintiff's Exhibit 2?
 - a. Whether appellant waived any objections thereto?
4. Whether the motive and purpose of the original author of the publication was material to appellant's defense?

Argument Summary.

The appellant urges upon appeal that the trial court committed reversible error in its instructions to the jury on the definition of obscene publications within the meaning of the statute. He cites cases in the District of Columbia and the Second Circuit as authority for the test and standard of obscenity that he advances. He sets forth this alleged error as his paramount point in his reply brief.

There is no merit to his position. There is an apparent conflict in authority on this rule of law according to recent decisions. Appellant's position is supported by the minority view which appears to find support in two eastern jurisdictions only. Such is not the law of this jurisdiction, nor the majority view. The instruction given

by the trial court in the present case is substantially in accord with the rule of the United States Supreme Court in so far as it has spoken on the test and standard of obscenity. Also, the test applied by the trial court is in accord with the prevailing Federal rule. Furthermore, it is the law of the Ninth Circuit and is substantially the test and standard applied in the *Magon* and *Duncan* cases hereinafter cited. The law of these two cases has not been changed in this jurisdiction since these opinions were handed down. It would appear from the court's instructions that they are taken almost entirely from these two cases. Therefore, it is submitted that the instruction given was a correct statement of the law, and that no error was committed in giving the complete definition of the meaning of obscenity as applied to publications within the meaning of the statute.

The point was urged by appellant that the original book from which the publication "Confessions of a Prostitute" was taken was written by a social worker. She compiled her studies and published the book "Sterile Sun" in order to jolt society into improving the conditions which it had brought about. The decisions hereinafter cited show that the purpose and motive of one who writes such a book is immaterial. Further, the cases hold that if the matter is obscene there is a violation of the statute if it is transmitted through the mail regardless of any good motive or purpose in so doing. Nothing appears in the record to show that appellant had any object or motive to better

society or supply his publication to social workers, scientists or doctors or contribute anything to literary progress.

If appellant's own test had been applied to the present case under instructions, there is an abundance of evidence that would have justified the jury in finding that the publication appealed more to the salacity of the reader than to any scientific, social or literary objective. It is undisputed that the trial court must first determine whether or not the publication could have the tendency to deprave the morals of the reader, and whether or not its dominant motive was to appeal to the lust and salacity or deprave the morals of the reader when taken as a whole. It is submitted that this publication could and did have the tendency to do so, thus outweighing any literary, scientific or medical value. On this point the jury has spoken, and the publication has been declared to have been obscene, lewd, lascivious and filthy as charged in the indictment. Therefore, the verdict of the jury and judgment of the trial court should not be disturbed. Upon review, the question is whether or not the trial court was in error in giving the case to the jury. It is only when there is no evidence by which the jury could have found an issue of fact that it will be disturbed upon appeal. The general rule is that where reasonable minds may differ and by reasonable judgment reach different conclusions as to the character of such writings, it is the duty of the court to submit the question to the jury. Such was properly done in this case.

A further point is raised by appellant that the trial court committed error in failing to restrain him from testifying about his prior convictions. The record will show that appellant conducted his own defense and took the stand to testify at his own request. It will show that he was eager to tell his life story which included prior convictions, one being of a similar offense in New York. The court committed no error in allowing defendant to conduct his defense in any manner he saw fit. Any objection to evidence which he introduced must be deemed as waived. Furthermore, it has been held in this jurisdiction that evidence of prior similar offenses may be shown to prove intent, state of mind, scheme or planning, and to negate any defense of accident or inadvertence. It goes without saying that a witness may be impeached by proof of a prior conviction. Therefore, it is submitted that no reversible error was committed by the court in this regard, and whatever error was committed by defendant cannot be complained of at this stage of the case.

Appellant further complains that the court committed error in allowing Plaintiff's Exhibit 2 to go to the jury wherein certain sentences were underlined by red pencil. The record discloses that the court gave a cautionary instruction to the jury about this exhibit, and pointed out that such red lines were not placed there by the court, and were not to be considered placed by defendant, but apparently had been drawn for the convenience of the Government only. The exhibit as a whole was submitted to

the jury for their consideration upon the stipulation of defendant and appellant at the time of the trial. He agreed to the stipulation that it might be submitted to the jury rather than read to them as is usually done when a document is received in evidence. Had appellant insisted that the exhibit be read to the jury obviously the red lines would have been unknown to them. Any objection which has been raised upon appeal for the first time to this alleged error must be considered as having been waived. Therefore, it is submitted that whatever error was committed was harmless error, and therefore, must be disregarded.

Appellant's major attack has been directed against the publication itself. However, it must be observed that he was convicted upon three other counts in addition to Count One which charged mailing of this publication. The three other counts refer to the publication, but each count charges a letter was sent to the prospective reader containing extracts from the publication. The extracts contain sufficient obscene, lewd, lascivious and filthy matter to justify a jury in finding that said letters were obscene independent of any reference to the publication itself. The judgment of the trial court should therefore be affirmed.

POINT I.

The Trial Court Committed No Error in Its Instructions to the Jury on the Definition and Test of Obscenity Within the Meaning of the Statute.

A. The Instruction Given Was a Correct Statement of Law and Was Not Reversible Error.

Appellant contends that the test of whether or not a publication is obscene is that set forth in *Walker v. Popenoe*, 149 F. 2d 511, at 512, C. A.-D. C., wherein it is stated that:

“The standard must be the likelihood that the work will so much arouse the *salacity* of the reader to whom it is sent as to *outweigh* any literary, scientific or other merits it may have in that reader’s hands.”

The word *salacity* means that which is lustful, lewd, impure or lecherous as defined by McMillan’s Modern Dictionary, revised edition 1947.

The case of *United States v. One Book Entitled Ulysses*, 72 F. 2d 705, Cal. App. 2d, is cited by appellant for the proposition that works of physiology, medicine, science and sex instruction are not within the statute, though to some extent and among some persons they may tend to promote lustful thoughts. (P. 707.) The Court goes on to point out that the same immunity should apply to literature as to science, where the presentation, when viewed objectively, is sincere, and the erotic matter is not introduced to promote lust and does not furnish the dominant note of the publication. The question in each case is whether a publication taken as a whole has a *libidinous* effect.

The word libidinous means lewd, lascivious, and immoral. (McMillan's Dictionary, *supra*.)

The case of *Parmelee v. U. S.*, 113 F. 2d 729, C. A.-D. C. 2, is further relied upon by appellant for a correct standard and test by which it may be determined whether or not a certain publication falls within the prohibition of the statute.

The appellant relies heavily upon these above cases since he contends that they repudiate the doctrine of *Regina v. Hicklin*, L. R. 3 Q. B. 360, and that the instruction given by the trial judge in the present case, was similar to and based upon that English case. The *Parmelee* case contains a strong dissent. The *Ulysses* case (1934) from the Southern District of New York was a libel action against a book of fiction and likewise is weakened by a strong dissent.

The appellant at page 12 of his reply brief, contends that the Court makes it clear that the Supreme Court has never approved the test of the *Regina* case. He cites the case of *United States v. Levine*, 83 F. 2d 156 at 157 (C. A. 2, 1936), as authority for this proposition.

However, Circuit Judge Manton who wrote the dissent in the *Ulysses* case (1934) disagrees with appellant at page 710 of the opinion as follows:

"Further the Supreme Court approved the test of the Hicklin Case. On page 43 of 151 U. S., 16 S. Ct. 434, 439, the court states:

"That was what the court did when it charged the jury that "the test of obscenity is whether the tendency of the matter is to deprave and corrupt the morals of those whose minds are open to such influence, and into whose hands a publication of this sort may fall. Would it," the court said, "suggest or

convey lewd thoughts and lascivious thoughts to the young and inexperienced?" In view of the character of the paper, as an inspection of it will instantly disclose, the test prescribed for the jury was quite as liberal as the defendant had any right to demand.' "

The dissent further points out the views of the Supreme Court in *Dunlop v. U. S.*, 165 U. S. 486, 17 S. Ct. 375, 380, 41 L. Ed. 799, where it reviewed and approved a charge in a criminal case upon the subject of obscene publications.

If the rule of the *Regina v. Hicklin* case is substantially the same as the instruction to the jury in the present case, it appears from the above decisions that the U. S. Supreme Court is in full accord. Further it is pointed by the dissent in the *Ulysses* case that:

"The tendency of the matter to deprave and corrupt the morals of those whose minds are open to such influence and into whose hands the publications of this sort may fall, has become the test thoroughly entrenched in the federal courts. *United States v. Bebout* (D. C.) 28 F. 522; *United States v. Wightman* (D. C.), 29 F. 636; *United States v. Clarke* (D. C.), 38 F. 732; *United States v. Smith* (D. C.), 45 F. 476; *Burton v. United States*, 142 F. 57 (C. C. A. 8); *United States v. Dennett*, 39 F. (2d) 564, 76 A. L. R. 1092 (C. C. A. 2). What is the probable effect on the sense of decency of society, extending to the family made up of men, women, young boys, and girls, was said to be the test in *United States v. Harmon* (D. C.), 45 F. 414, 417."

What is claimed by appellant to be the law of the land is apparently the law in the District of Columbia and the Second Circuit only. The general rule of the Federal

Courts and the Supreme Court appears to be otherwise. Furthermore, the rule of the *Ulysses* case and that of the *Walker v. Popenoe* case is not binding on the Federal Courts of the Ninth Circuit. This Court, in the case of *Magon v. United States* (C. C. A. 9, 1918), 248 Fed. 201, 203, said:

“In construing the word ‘obscene,’ as used therein, it has been uniformly held that, if the matter complained of were of such a nature as would tend to corrupt the morals of those whose minds are open to such influences by arousing or implanting in such minds lewd or lascivious thoughts or desires, it is within the prohibition of the statute, and that whether or not it had such tendency was a question for the jury. *Rosen v. United States*, 161 U. S. 29, 16 Sup. Ct. 434, 480, 40 L. Ed. 606; *Knowles v. United States*, 170 Fed. 409, 95 C. C. A. 579; *United States v. Bennett*, Fed. Cas. No. 14,571; *McFadden v. United States*, 165 Fed. 51, 91 C. C. A. 89; *Demolli v. United States*, 144 Fed. 363, 75 C. C. A. 365; *United States v. Musgrave* (D. C.), 160 Fed. 700; *United States v. Harmon* (D. C.), 45 Fed. 414; *United States v. Clarke* (D. C.), 38 Fed. 732.”

Again in the later case of *Duncan v. United States* (C. C. A. 9, 1931), 48 F. 2d 128, at 132, the test applied by the trial court in the present case was restated by the Court to be the law of this jurisdiction as follows:

“An elaborate discussion of that question we think entirely unnecessary because there is no serious disagreement in the authorities nor between the parties as to the law upon the subject. The test is as to whether or not the language alleged to be obscene would arouse lewd or lascivious thought in the minds of those hearing or reading the publication. * * *

And our own more recent decision in *Magon v. U. S.*, 248 F. 201, 203, where it was said: 'In construing the word "obscene," as used therein, it has been uniformly held that, if the matter complained of were of such a nature as would tend to corrupt the morals of those whose minds are open to such influences by arousing or implanting in such minds lewd or lascivious thoughts or desires, it is within the prohibition of the statute, and that whether or not it had such tendency was a question for the jury.' (Citing numerous cases to which we refer.)"

The rule and test approved by our Ninth Circuit appears to be the law of the Eighth Circuit also.

In the case *Knowles v. United States*, 170 Fed. 409 (C. C. A. 8), 1909, the Court said,

"The true test to determine whether a writing comes within the meaning of the statute is whether its language has a tendency to deprave and corrupt the morals of those whose minds are open to such influences, and into whose hands it may fall, by arousing or implanting in such minds obscene, lewd, or lascivious thoughts or desires."

In 1909 the word filthy was added to the statute, Title 18, U. S. C. A. Section 334, in which every obscene, lewd or lascivious, and every filthy letter, writing, publication, pamphlet, or picture of an indecent character was declared to be unmaillable. "Filthy" means morally foul, polluted, nasty. *United States v. Davidson* (D. C.), 244 Fed. 523, 526. Dirty, vulgar, indecent, offensive to the moral sense, morally depraving, debasing. *Tyomies Pub. Co. v. U. S.* (C. C. A.), 211 Fed. 385, 390; also Black's Law Dictionary.

In the *Limehouse* case (1932), *supra*, the Supreme Court at page 426 declared that it thought by the more natural reading of the clause to hold that Congress by the 1909 amendment added a new class of unmailable matter—the filthy.

B. It Was Immaterial Whether or Not the Author of the Original Book From Which the Publication in Question Was Taken Had Good Motives Directed Toward Social Reform.

It appears from the record [Rep. Tr. 35-36] that Appellant's Exhibit "A", the book entitled "Sterile Sun" was received in evidence over the government's objection.

In the case of *Knowles v. U. S.* (C. C. A. 8), 1909, 170 Fed. 409, 411, the defendant urged that his article contained a sincere discussion of an important social question, and that he was actuated only by the highest motives. His motive may have been ever so pure if the paper he mailed was obscene, he was guilty. There was no reference in the statute to the design or intent that a man has in depositing nonmailable matter in the mail. He cannot violate the law, even though his purpose be to accomplish good, so the Court held.

C. The Question of Whether or Not the Publication Was Obscene, Lewd, Lascivious and Filthy Was an Issue of Fact and Was Properly Submitted to the Jury.

As the Court stated in the *Knowles* case, 170 Fed. 409 at page 410, in all indictments under this statute there is a preliminary question for the Court to say whether the writing could be any reasonable judgment, be held to come within the prohibition of the law. It leaves a wide field for the sound, practical judgment of the jury to determine

the true character of the writing, and its probable effect upon the mind of readers. *Whenever reasonable minds might fairly reach different conclusions as to the character of the writings, it is the duty of the Court to submit the question to the jury.* *Rose v. United States*, 161 U. S. 29, 16 Sup. Ct. 434, 480, 40 L. Ed. 606; *United States v. Bennett*, 16 Blatchf. 342, Fed. Cas. No. 14,571; *United States v. Davis* (C. C.), 38 Fed. 326; *United States v. Harmon* (D. C.), 45 Fed. 418.

D. By the Test Advanced by Appellant and Decisions Cited in Support Thereof, This Publication Was Obscene, Lascivious and Filthy.

Upon review the question is whether the trial court was correct in first deciding that the publication here could have the tendency to “arouse the salacity of the reader, so as to outweigh any literary, scientific or other merits it might have in his hands. (The test of the *Walker v. Popenoe* case, App. Rep. Br. p. 13.)

Is there not an abundance of evidence in the record that the publication, “Confessions of a Prostitute” could and did have a tendency to debase the morals of the reader—as opposed to any uplifting result? How could such matter fail to appeal to the salacity of the reader—as a question of fact? As such, it was the duty of the trial court to submit the issue to the jury. To them was properly left the true character of the writing and its probable effect upon the mind of readers.

We submit that the jury was correct in the present case and its verdict should not be disturbed.

E. No Error Was Committed by the Court in Regard to Plaintiff's Exhibit 2, Wherein Certain Passages Were Underlined.

The Court carefully pointed out to the jury that in Exhibit 2 certain sentences were underlined in red, but that they were not placed there by this Court. [Rep. Tr. 103.] Being evidently placed there at the convenience of the government, the jury was instructed that they must not believe that said red lines were placed there by defendant. However, defendant stipulated that said Exhibit 2, "Confessions of a Prostitute" need not be read to the jury (in which case the red lines would not have been seen by the jury or any emphasis added one way or the other), but that this exhibit would go to the jury with other exhibits for their consideration. [Rep. Tr. 102.]

Thus, any objections to having this exhibit seen by the jury rather than read to them, must be deemed to have been waived by appellant. Rule 52(a) provides that any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

The case of *United States v. Davidson*, 244 Fed. 523, at 528, cites with approval *United States v. Wyatt* (D. C.), 122 Fed. 316, wherein the Court charged the jury:

"That a letter need not be obscene, lewd, or lascivious in each of its sentences or in all its parts in order to be an obscene, lewd or lascivious letter within the meaning of the statute. If it is obscene, lewd, or lascivious in one or more of its parts or sentences, or portions of sentences, it is an obscene, lewd or lascivious letter within the meaning of the statute."

POINT II.

The Court Committed No Reversible Error in Failing to Restrain Appellant in Telling the Jury of Other Similar Offenses.

A. Prior Similar Offenses Are Dismissible in Evidence to Prove Intent, State of Mind, Plan or Scheme.

Where intent, state of mind, or plan is an issue in any criminal case, the rule is well established in this jurisdiction that evidence of prior similar offenses may be received to show such intent and the absence of accident or inadvertence.

Henderson v. United States, 143 F. 2d 681, at 683;
People v. Lisenba, 14 Cal. 2d 403, 94 P. 2d 569,
579-584.

Such evidence was not admitted over appellant's objection, but upon his request, and in fact, he insisted on telling his complete life story and record of crime. He refers again to this similar conviction in New York of 1947 on page 1 of his opening brief. The rule of evidence is too well established to require authority, that a witness who testifies may be impeached by proof that he has been convicted of any felony or felonies.

B. The Judgment of the Trial Court Should Be Sustained Unless From a Review of the Entire Record and the Evidence, There Has Been a Miscarriage of Justice.

This Court said in *Henderson v. United States*, 143 F. 2d 681 (C. C. A. 9, 1944), at page 682:

"It is a familiar principle, which it is our duty to apply, that an appellate court will indulge all reasonable presumptions in support of the rulings of a trial court and therefore that it will draw all inferences permissible from the record, and in determining whether evidence is sufficient to sustain a conviction,

will consider the evidence most favorable to the prosecution. *United States v. Manton*, 2 Cir., 107 F. 2d 834, 839; *Shannabarger v. United States*, 8 Cir., 99 F. 2d 957, 961; *Borgia v. United States*, 9 Cir., 78 F. 2d 550, 555. * * *

Conclusion.

The trial court applied the true test and standard in its instructions to the jury on the definition of what matter is obscene within the meaning of the statute. The instruction was in accord and based upon the prevailing rule of law in this jurisdiction. There is no good and sufficient reason to adopt the minority view now. Whatever new objections to alleged errors of the trial court were waived by appellant as the record demonstrates. If any error were committed it was either harmless, or it was in appellant's favor, in which case either it must be disregarded, as he is in no position to complain.

It is a well founded rule that every reasonable presumption will be indulged in favor of the rulings of a trial court. If all permissible inferences are drawn from the record in this case, the evidence is amply sufficient to sustain the conviction. Therefore, the judgment should be affirmed.

Respectfully submitted,

JAMES M. CARTER,

United States Attorney;

ERNEST A. TOLIN,

Chief Assistant U. S. Attorney;

NORMAN W. NEUKOM,

Assistant U. S. Attorney;

HERSCHEL E. CHAMPLIN,

Assistant U. S. Attorney,

Attorneys for Appellee.

United States
Court of Appeals
for the Ninth Circuit

NAT YANISH, WILLIAM HEIKKILA, JOHN
VOICH, JOHN DIAZ, HERMAN LANS-
BURG and FRANK CARLSON,
Appellants,
vs.

I. F. WIXON, Individually, and as District Di-
rector, Immigration and Naturalization Service,
Department of Justice,
Appellee.

Transcript of Record

Appeal from the United States District Court
for the Northern District of California,
Southern Division

MAR 28 1949

PAUL P. O'BRIEN,



United States
Court of Appeals
for the Ninth Circuit

NAT YANISH, WILLIAM HEIKKILA, JOHN
VOICH, JOHN DIAZ, HERMAN LANS-
BURG and FRANK CARLSON,
Appellants,

VS.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Northern District of California.
Post Office Building,
San Francisco, California.

Attorney for Defendant and Appellee.

In the District Court of the United States, Northern
District of California, Southern Division

In Equity—No. 28347-H

NAT YANISH, WILLIAM HEIKKILA, JOHN
VOICH, JOHN DIAZ, and HERMAN LANS-
BURG, FRANK CARLSON,

Plaintiffs,

vs.

I. F. WIXON, individually, and as District Direc-
tor, Immigration and Naturalization Service,
Department of Justice,

Defendant.

COMPLAINT FOR REVIEW OF AGENCY ACTION AND FOR INJUNCTIVE RELIEF

Plaintiffs complaining of defendant allege as
follows:

I.

This action seeks a review of the action of the Immigration and Naturalization Service of the Department of Justice in and for the 13th Immigration District, which District includes the territory within the jurisdiction of this Court, an agency of the Federal Government acting by the defendant Wixon, in denying to the plaintiffs herein the right to be heard before a hearing officer appointed, qualified, and acting under and pursuant to § 5(c) and §§ 7, 8, and 11 of the Administrative Procedures Act (60 Stat. 243, 5 U.S.C.A. §§ 1001 et seq., hereinafter called the Act; a stay of agency proceedings except before an officer appointed in con-

formance with the Act; and an injunction against the defendant Wixon, restraining him from denying to plaintiffs their rights as secured by the said Act and by the Fifth Amendment to the Constitution of the United States.

Jurisdiction is conferred upon this Court by § 10 of the Act, 60 Stat. 243, 5 U.S.C.A. § 1009 and 28 U.S.C.A. § 1331.

II.

This action arises under the Fifth Amendment to the Constitution of the United States and under the provisions of the Act, 5 U.S.C.A. §§ 1001 et seq. as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.

III.

Plaintiffs herein are aliens, of various nationalities, resident in the United States.

IV.

Defendant I. F. Wixon is the District Director of the Immigration and Naturalization Service of the Department of Justice for the 13th Immigration District of the United States, which includes the territory within the jurisdiction of this Court. He is the officer of the Service in direct charge of the agency proceedings complained of herein. That he is located and has a place of business in the City and County of San Francisco, State of California, and is within the jurisdiction of the above-entitled Court.

V.

At various times past the defendant I. F. Wixon caused to be served upon plaintiffs herein, with the exception of the plaintiff Lansburg, warrants of arrest in which it was alleged that plaintiffs were aliens and subject to deportation and that pursuant thereto, plaintiffs were taken into custody and held for hearing.

That thereafter, proceedings for the deportation of the plaintiffs herein were conducted by the agents of the defendant in the City and County of San Francisco, State of California.

VI.

That no persons, including the plaintiffs, may be deported save after an adjudication required by statute to be determined on the record after opportunity for an agency hearing.

That the provisions of § 5 of the Act provide that such hearings shall be conducted in accordance with the provisions of §§ 7 and 8 of said Act, and that no hearing officer who is responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the investigative or prosecuting functions of the agency shall preside at the hearing.

§ 7 requires, among other things, that such hearing shall be conducted in an impartial manner, and § 11 requires, among other things, that the hearing officer shall be assigned in rotation from among a panel of competent examiners qualified subject to the Civil Service and other laws of the United States.

Neither the presiding inspector appointed to preside over the hearing herein, nor any other inspector of the Service, has been appointed to or holds office in accordance with § 11 of the said Act, nor do they possess the qualification and authority set forth in §§ 5(c), 7, and 8 thereof.

VII.

That prior to the 7th day of May, 1948, plaintiffs, by their attorneys, Gladstein, Andersen, Resner & Sawyer, objected, in the course of the said hearings, to the proceedings on the grounds that they were not conducted in conformity with requirements of the Act as set forth above. That on May 7, 1948, plaintiffs, by their attorneys, by letters to the Immigration and Naturalization Service at 630 Sansome Street, San Francisco, California, and specifically directed to Stan Olson, Chief of the Expulsion Section, which letters were identical in content, an agent of the defendant herein, renewed their objections to the proceedings on the grounds that they did not comply with the said Act. A copy of one of the said letters is attached hereto, marked Exhibit A, and is hereby incorporated in this complaint as though set forth in full herein.

That thereafter, in reply to the said letters, defendants by their agent Robert S. DeMoulin informed plaintiffs herein, by identical letters directed to plaintiffs' attorneys dated May 18, 1948, a copy of one of which is attached hereto and incorporated herein and marked Exhibit B, that hearings in the

proceedings against plaintiffs herein had been deferred pending further instructions from the central office of the Service.

That thereafter on or about September 9, 1948, defendant by his agent Stan Olson, demanded of plaintiffs by identical letters, a copy of one of which is attached hereto and incorporated herein and marked Exhibit C, that they appear at the office of the Service in San Francisco, California, on certain named dates in October, 1948, for further hearings in the said deportation proceedings. That thereafter on September 15, 1948, defendant by his agent Stan Olson informed plaintiffs, by a letter directed to their attorneys, a copy of which is attached hereto and made a part hereof and marked Exhibit D, of a decision dated July 28, 1948, of the Honorable Alexander Holtzoff, Associate Justice, District Court of the United States, for the District of Columbia an Act No. 3420, to the effect that the Act does not apply to deportation proceedings. That defendant by this letter implied and threatened that further proceedings would be conducted against plaintiffs herein without compliance with the Act.

That, as set forth in the affidavit of Lloyd E. McMurray, attached to this complaint, marked Exhibit E, and made a part hereof as though fully set forth herein, defendant threatens to conduct the said deportation proceedings from which dates in October, 1948, have been set, without in any way complying with the provisions of said Act.

VIII.

The regulations of the Service do not provide that an appeal from a ruling that the Act does not apply will render said ruling inoperative pending appeal, but on the contrary, the hearings will proceed despite said appeal.

That the proceedings for deportation heretofore conducted by the defendant against the plaintiffs herein, without conformance to the provisions of the Act, and the refusal of defendant to sustain plaintiffs' objections to such procedure, constitute a ruling that the Act does not apply, and such ruling is final agency action for which review is provided in § 10 of the Act.

IX.

The defendant intends to conduct the deportation hearings of plaintiffs before a presiding officer who is responsible to and subject to the supervision and direction of defendant, his officers, employees or agents who are engaged in the performance of investigative and prosecuting functions of the defendant; who is not able to conduct such hearings in an impartial and independent manner; who has not been qualified as a competent examiner subject to the Civil Service and other laws of the United States; who has not been assigned to the hearing of plaintiffs' cases in rotation, but, on the contrary, has been specifically selected by defendant for the purpose of presiding over plaintiffs' hearing; and other wise the defendant proposes completely to disregard the provisions of the Act and the safe-

guards for a fair hearing afforded to the plaintiffs hereunder.

By reason of the foregoing, the said hearing will be wholly void. Nevertheless, the hearings and proceedings contemplated by the defendant will take approximately two years or more. The acts of the defendant constitute an immediate threat to plaintiffs' liberty and expose them to irreparable injury, and they are suffering legal wrong and are adversely affected and aggrieved thereby and denied rights secured to them by the Act and by the Fifth Amendment to the Constitution of the United States in that the defendant will compel them by his proposed action to submit to the hearings before such illegally designated and purported hearing officer under penalty of imprisonment.

In consequence of said threatened loss of liberty, plaintiffs are threatened with the deprivation of the opportunity to earn a livelihood.

X.

The action by the defendant requiring and compelling plaintiffs to appear and to submit to a hearing before an inspector appointed, assigned and acting in violation of the Act is in excess of the jurisdiction of the Service, for which there is no relief other than that which may be allowed through the equity powers of this Court and through its power to review agency action as set forth in § 10 of the Act.

XI.

The action of the defendant in thus threatening the plaintiffs with loss of liberty and property will cause them irreparable injury, for which there is no adequate remedy at law.

Wherefore, plaintiffs pray for judgment restraining the defendant, his agents, representatives, employees, and attorneys, from conducting or pursuing further proceedings against the plaintiffs, upon the warrants heretofore issued, seeking plaintiffs' deportation, except before a hearing officer appointed and assigned in accordance with the provisions of the Act, and except in the manner required by the Act.

Pending the trial of this action plaintiffs pray for an interlocutory injunction restraining the defendant, his agents, representatives, and attorneys, from proceeding with the hearing of the charges alleged in the warrants of arrest, and for such other necessary and appropriate relief as may be necessary to preserve the status and rights of the parties, pending the determination of this judicial review of agency action, except that no restraint shall apply to hearings or other proceedings conducted in compliance with the terms of the Act.

In addition, plaintiffs pray that pending the hearing of the motion for an interlocutory injunction, to avoid irreparable loss and damage to the plaintiffs, and to preserve the status and rights of the parties, and to preserve the controversy and jurisdiction of the Court, plaintiffs pray for a temporary

restraining order to the like effect as the interlocutory injunction prayed for herein, and for such other, further, and different relief as to the Court may seem just and proper.

Dated October 5, 1948.

GLADSTEIN, ANDERSEN,
RESNER & SAWYER,

By /s/ LLOYD E. McMURRAY,
Attorneys for Plaintiffs.

(Duly Verified.)

EXHIBIT "A"

May 7, 1948

Immigration and Naturalization Service
630 Sansome Street
San Francisco 11, California

Attention: Stan Olson, Chief Expulsion Section
Re: Nathan Yanish—File No.

Gentlemen:

As we have previously advised you in this proceeding, we were always of the opinion that the Administrative Procedure Act required the appointment of an impartial examiner to sit in each of these cases, and in this case, as well as in the other cases pending in which we represent the alleged aliens, our motions for compliance with the Administrative Procedure Act have been denied.

You, of course, have been advised of the decision of Judge Goldsborough in Washington, D. C. in the Eisler case. Judge Goldsborough has decided the precise point presented by the facts of this case, and we not only charge in this case the fact of

non-compliance with the Administrative Procedure Act, but now again direct the matter to your attention, and we intend this letter as a motion to strike all testimony heretofore taken in this proceeding.

I assume that it will be the intention of the department to hold these cases in abeyance pending further study by your department, and we suggest that you immediately advise us of your intentions.

Very truly yours,

.....

GRA:ck

EXHIBIT "B"

U. S. Department of Justice
Immigration and Naturalization Service
San Francisco 11, California

File Number 245-P-71340

May 18, 1948

Messrs. Gladstein, Andersen, Resner & Sawyer
240 Montgomery Street
San Francisco, California

Attention: Mr. George R. Andersen

Re: Nathan Yanish

Gentlemen:

Please be informed that hearing in your above-named client's case has been deferred pending further instructions from our Central Office.

Very truly yours,

For the District Director
/s/ ROBERT S. DE MOULIN,

Acting Chief, Expulsion Section.

CC: Mr. Nathan Yanish, 4071 Waterhouse Road,
Oakland, California.

EXHIBIT "C"

U. S. Department of Justice
Immigration and Naturalization Service
San Francisco 11, California
630 Sansome Street
September 9, 1948

245-P-71340

Registered mail—return receipt requested.

Nat Yanish (Noyach Yanishevsky)
4071 Waterhouse Road

Oakland, California

Dear Sir:

This communication will constitute a formal demand upon you for your appearance for hearing at this office, Room 1017, Appraisers Building, 630 Sansome Street, San Francisco, California, at 9:00 a.m., Monday, October 4, 1948.

Failure to appear in accordance with the foregoing demand may result in the recommendation that the bond executed by you on October 17, 1946 be declared breached and the penalty forfeited.

Yours very truly,

For the District Director

/s/ STAN OLSON,

Chief, Expulsion Section.

CC: Richard Gladstein, Attorney at Law, 240
Montgomery Street, San Francisco 4, California.

EXHIBIT "D"

U. S. Department of Justice
Immigration and Naturalization Service
San Francisco 17, California

September 15, 1948

Gladstein, Andersen, Resner & Sawyer
Attorneys at Law
240 Montgomery Street
San Francisco, California

Re: Nat Yanish, et al.

Gentlemen:

There is attached hereto Decision dated July 28, 1948 of the Honorable Alexander Holtzoff, Associate Justice, District Court of the United States for the District of Columbia, Civil Division, Washington, D. C., in the case of Wong Yang Sung, Plaintiff, vs. Tom Clark, Attorney General of the United States, and Watson B. Miller, United States Commissioner of Immigration and Naturalization Service, Defendants. It is our understanding that there have been one or two other decisions elsewhere which we have not received which are in accord with this decision—that is to say, opposed to the Goldsborough decision with reference to the Gerhardt Eisler case.

Yours very truly,

For the District Director

/s/ STAN OLSON,

Chief, Expulsion Section.

Encl.

In the District Court of the United States for the
District of Columbia, Civil Division

H. C. 3420

WONG YANG SUNG, 656 Pennsylvania Avenue,
S.E., Washington, D. C.

Plaintiff,

vs.

TOM CLARK, Attorney General of the United
States and WATSON B. MILLER, United
States Commissioner of Immigration and Natur-
alization, both of Washington, D. C.,

Defendants.

Washington, D. C., July 28, 1948

The above entitled matter came on for a hearing
on a petition for a writ of Habeas Corpus, before
the Honorable Alexander Holtzoff, Associate Jus-
tice, sitting as Motions Judge, at 11:45 a.m.

Appearances: In behalf of the plaintiff; Thomas
Farrell, Esq., Leo J. Nichaloski, Esq., present. In
behalf of the defendants: Oliver Dibble, Esq.,
United States Attorney.

ORAL CONCLUSIONS OF THE COURT

The Court: This is a writ of habeas corpus to
review an order of deportation. The petitioner,
whose deportation has been ordered by the Attorney
General of the United States pursuant to the pro-
visions of the Immigration Laws, objects that the
proceeding was not held and conducted in accord-
ance with the provisions of the Administrative
Procedure Act.

Section 7 of the Administrative Procedure Act, U. S. Code, Title 5, Section 1006, on which the petitioner relies, requires statutory hearings to be conducted before an examiner appointed pursuant to the provisions of the Act. The hearing in this case, as is customary in all Immigration deportation proceedings, was conducted by an Inspector or Board of Inspectors of the Immigration Service. If the requirements of the Administrative Procedure Act are applicable, the hearing was not properly conducted.

The Court, however, feels that the Administrative Procedure Act does not apply to hearings under the Immigration Laws, in the light of the following provision of Section (a) of Section 7 of the Administrative Procedure Act, and I quote:

“Nothing in this chapter shall be deemed to supersede the conduct of specific classes of proceedings in whole or in part by or before boards or other officers specially provided for by, or designated pursuant to statute.”

Section 152 of Title 8 of the Immigration Law, which governs the authority and powers of Immigration Inspectors, provides that said Inspectors shall have power to administer oaths and to take and consider evidence touching the right of any alien to enter, re-enter, pass through or reside in the United States, and where such action may be necessary, make a written record of such evidence. In the light of this provision it seems to the Court that deportation proceedings are within the excep-

tion specially specified in Section 7(a) of the Administrative Procedure Act, because it is "a specific class of proceeding before officers specially provided for by, or designated pursuant to statute."

In the light of this, the Court feels that immigration deportation hearings may be properly conducted by Immigration Inspectors and that the requirement as to hearing before specially appointed examiners as provided by the Administrative Procedure Act, does not apply.

The writ will be dismissed.

EXHIBIT "E"

AFFIDAVIT OF LLOYD E. McMURRAY

State of California,

City and County of San Francisco—ss.

Lloyd E. McMurray, being first duly sworn, deposes and says:

That he is an attorney-at-law with the firm of Gladstein, Andersen, Resner & Sawyer and one of the attorneys for plaintiffs herein; that deportation proceedings have in the past been conducted by the defendants herein against the plaintiffs herein in conformity with the usual practice of the defendants;

That the said proceedings were conducted without regard to the requirements of the Administrative Procedure Act, 60 Stat. 244, 5 U.S.C.A. §§ 1001 to 1011 and particularly §§ 1004, 1006, 1007 and 1010 thereof.

That on or about the 18th day of May, 1948, after the plaintiffs herein had objected to failure to

comply with the terms of the said Administrative Procedure Act, and after the decision of the United States District Court for the District of Columbia in the case of Gerhart Eisler, et al. vs. Tom C. Clark, et al, Civil Action No. 1173-48, the proceedings against the plaintiffs herein were suspended.

That subsequently, on or about the 9th day of September, 1948, defendants herein ordered the plaintiffs herein to appear on various dates for the purpose of continuing the said deportation proceedings;

That your affiant is informed and believes and on such information and belief alleges that defendants herein threaten and intend to continue the said deportation proceedings against plaintiffs herein without regard to the provisions of the said Administrative Procedure Act.

/s/ LLOYD E. McMURRAY.

Subscribed and sworn to before me this 5th day of October, 1948.

(Seal) /s/ ALICE C. MORSE,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Oct. 5, 1948.

[Title of District Court and Cause.]

MOTION IN OPPOSITION TO PLAINTIFFS'
REQUEST FOR RESTRAINING ORDER

Comes now I. F. Wixon, individually, and as District Director, Immigration and Naturalization Service, District Thirteen, and moves the Court to deny the prayer for restraining order by plaintiffs against him in the above-entitled matter for the following reasons:

1. He is not a proper party defendant individually or officially.

2. The prayer of the plaintiffs is that the defendant be enjoined from the performance of an official and administrative act over which he has no control.

3. The complaint in this action states no cause of action against I. F. Wixon, individually or officially.

4. Each and every one of plaintiffs, if taken into custody, has a remedy for any claim of illegal custody under a writ of habeas corpus.

5. Defendant contends that the Administrative Procedure Act of June 11, 1946, (5 U.S.C. 1001-1011) has no application to hearings in deportation and exclusions proceedings under the immigration laws.

6. The defendant further contends that each and all of the individual plaintiffs has, in fact, been

accorded the substantial protection provided by the Administrative Procedure of June 11, 1946 Act.

7. It affirmatively appears from the complaint of plaintiffs that they have not exhausted their legal administrative remedies, and are therefore not entitled to the relief sought at this time.

/s/ FRANK J. HENNESSY,

United States Attorney.

/s/ EDGAR R. BONSTALL,

Assistant U. S. Attorney,

Attorneys for Defendant.

[Endorsed]: Filed Oct. 7, 1948.

[Title of District Court and Cause.]

MEMORANDUM OPINION AND ORDER

Plaintiffs, alien residents of the United States against whom warrants have been issued charging them with membership in groups which advocate overthrow of the Government of the United States by force and violence, and with personal advocacy of such overthrow, seek to restrain defendant from conducting deportation proceedings against them. The grounds relied upon for the relief prayed for are in substance that the defendant has failed to appoint or assign a trial examiner to conduct hearings in accordance with the provisions of the Administrative Procedures Act and that the defendant is without right, authority or jurisdiction to proceed with the hearings under said warrants of arrest. 5 U.S.C.A. 1001 et seq. (hereinafter referred to as the Act).

Several preliminary objections have been urged on behalf of the defendant I. F. Wixon individually and as Director of Immigration and Naturalization Service.

First, that he is not a proper party individually or officially, and that the Attorney General of the United States should have been joined herein. This contention has been passed upon adversely to the claim of defendant in the recent case of *Williams v. Fanning*, 332 U. S. 490.

Secondly, it is asserted that petitioners have not exhausted their administrative remedies. Petitioners, at the threshold of the controversy, contend that the proceedings about to be conducted before the Immigration Service are without right, authority or jurisdiction in the light of the Administrative Procedures Act. If, in law, their contention is correct, it would seem purposeless to require petitioners to expend their energies in a hearing before the Immigration Service if at the consummation thereof it appeared to a reviewing court that the jurisdictional premise is absent. We have concluded that in the light of the contentions urged, and under all of the circumstances present, petitioners are not obliged to exhaust their administrative remedies and are properly before this court insofar as a test of the jurisdiction is concerned.

We now pass to the major contention: The Administrative Procedures Act under Section 7(a), 5 U.S.C.A. 1006(a), creates the following exception which is applicable herein: "Nothing in this Chapter shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by

or before boards or other officers specially provided for by or designated pursuant to statute.”

It is manifest from a review of the Congressional proceedings antedating the enactment of the Administrative Procedures Act, and the clear context of the Act itself, that it was not the intention of Congress to interfere with or usurp traditional statutory proceedings of this nature conducted by the Immigration Service.

We conclude that the Administrative Procedures Act is not applicable herein and that petitioners have their remedies, looking toward due process, as integrated under 8 U.S.C.A. 152.¹ So other courts have held.²

The weight of current authority, at least in the trial courts, fortifies the conclusion we have reached.

Accordingly, the application for injunction is denied and the complaint is dismissed on the ground as heretofore indicated that the procedures of the Immigration Service fall within the exception specified in Section 7(a), *supra*, of the Act.

Dated December 20, 1948.

/s/ GEORGE B. HARRIS,

United States District Judge.

¹ *Loufakis v. United States*, 81 F. 2d 966; *Graham v. United States*, 99 F. 2d 746, 748.

² *Wong Yan Sun v. Clark*, 80 F. S. 235; *Obum v. Watkins*, S.D.N.Y. 45577; *Wong So Wan v. Wixon*, N.D. Cal. 28214-G; Cf. *Lee Tack v. Clark*, S.D.N.Y. 26279; Cf. *Azzollini v. Watkins*, S.D.N.Y. 47420.

[Endorsed]: Filed Dec. 20, 1948.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Nat Yanish, William Heikkila, John Voich, John Diaz, Herman Lansburg and Frank Carlson, plaintiffs above named, hereby appeal to the Court of Appeals for the Ninth Circuit from the order of the above entitled Court denying plaintiffs' application for an injunction and dismissing the complaint herein, made and entered in this action on the 20th day of December, 1948.

Dated December 28, 1948.

GLADSTEIN, ANDERSEN,
RESNER & SAWYER,
By /s/ LLOYD E. McMURRAY,
Attorneys for Plaintiffs.

(Acknowledgment of Service.)

[Endorsed]: Filed Dec. 29, 1948.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Come now Nat Yanish, William Heikkila, John Voich, John Diaz, Herman Lansburg and Frank Carlson, plaintiffs and appellants above named and designate the following as the record on appeal in the above entitled matter:

1. Complaint filed herein on October 5, 1948, together with Exhibits A, B, C, D and E attached thereto.

2. The motion in opposition to plaintiffs' request for a restraining order filed herein on October 7, 1948.

3. Memorandum opinion and order decided and filed herein on December 20, 1948.

4. This designation of record on appeal.

Dated January 12, 1949.

GLADSTEIN, ANDERSEN,
RESNER & SAWYER,
By /s/ LLOYD E. McMURRAY,
Attorneys for Plaintiffs.

(Acknowledgment of Service.)

[Endorsed]: Filed Jan. 14, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing documents, listed below, are the originals filed in this Court, in the above-entitled case, and that they constitute the Record on Appeal herein as designated by the Appellants.

Complaint for Review of Agency Action and for Injunctive Relief.

Motion in Opposition to Plaintiff's Request for Restraining Order.

Memorandum Opinion and Order.

Notice of Appeal.

Designation of Record on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 2nd day of February, A.D. 1949.

(Seal)

C. W. CALBREATH,
Clerk.

[Endorsed]: No. 12174. United States Court of Appeals for the Ninth Circuit. Nat Yanish, William Heikkila, John Voich, John Diaz, Herman Lansburg and Frank Carlson, Appellants, vs. I. F. Wixon, Individually and as District Director, Immigration and Naturalization Service, Department of Justice, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed February 5, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

No. 12,174

NAT YANISH, et al.,

Appellants,

vs.

I. F. WIXON, etc.,

Appellee.

STATEMENT OF POINTS ON APPEAL AND
DESIGNATION OF RECORD

Come now Nat Yanish, William Heikkila, John Voich, John Diaz, Herman Lansburg and Frank Carlson, appellants herein, and state the points upon which they will rely upon appeal herein, and the portions of the record necessary for consideration thereof, as follows:

1. The Court erred in denying plaintiffs' prayer for an injunction.

2. The Court erred in dismissing the complaint.

For consideration of the above points the entire certified record is hereby designated.

Dated February 21, 1949.

GLADSTEIN, ANDERSEN,
RESNER & SAWYER,

By /s/ LLOYD E. McMURRAY,
Attorneys for Appellants.

(Acknowledgment of Service.)

[Endorsed]: Filed February 23, 1949. Paul P. O'Brien, Clerk.

No. 12,174

IN THE

United States Court of Appeals
For the Ninth Circuit

NAT YANISH, WILLIAM HEIKKILA, JOHN
DIAZ, HERMAN LANSBURG and FRANK
CARLSON,

Appellants,

VS.

I. F. WIXON, Individually, and as Dis-
trict Director, Immigration and Natu-
ralization Service, Department of
Justice,

Appellee.

BRIEF FOR APPELLANTS.

FILED

MAY 28 1949

PAUL P. O'BRIEN,

CLERK

GLADSTEIN, ANDERSEN, RESNER
& SAWYER,

LLOYD E. McMURRAY,

240 Montgomery Street, San Francisco 4, California,

Attorneys for Appellants.

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IN THE

**United States Court of Appeals
For the Ninth Circuit**

NAT YANISH, WILLIAM HEIKKILA, JOHN
DIAZ, HERMAN LANSBURG and FRANK
CARLSON,

Appellants,

vs.

I. F. WIXON, Individually, and as Dis-
trict Director, Immigration and Natu-
ralization Service, Department of
Justice,

Appellee.

BRIEF FOR APPELLANTS.

JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of the United States District Court for the Northern District of California, Southern Division, in a civil suit against the defendant individually and as an officer of the Immigration and Naturalization Service of the Department of Justice of the United States, seeking a review of the proceedings of that agency, a stay of agency proceedings during the pendency of such

judicial review, and temporary and permanent injunctions restraining the defendant from conducting deportation proceedings against the plaintiffs without compliance with certain requirements of the Administrative Procedure Act (5 USC sec. 1001 et seq.).

Jurisdiction of this Court is conferred by section 10 of the Administrative Procedure Act (5 USC sec. 1009), by 28 USC sec. 1331, and by the Fifth Amendment to the Constitution of the United States.

The jurisdiction of the District Court and of this Court are pleaded in paragraphs I, II, III and IV of the complaint, appearing on pages 2 and 3 of the transcript.

STATEMENT OF THE CASE.

Appellants in this case are aliens lawfully residing in the United States, whose deportation is sought by the Immigration and Naturalization Service of the Department of Justice (hereinafter called the Service). Warrants have been issued by the Service for the arrest of the appellants and these warrants have been served upon them by the defendant. Appellants are not in custody, but have been arrested and released upon bond.

Appellee I. F. Wixon was until May 1, 1949, the District Director of the Service for the 13th Immigration District of the United States, which includes the territory within the jurisdiction of the District Court and of this Court. He has since May 1, 1949,

been succeeded by Arthur J. Phelan, as Acting District Director, who will be substituted for Wixon as appellee.

Appellee Wixon by his agents and servants, in pursuit of his official duties, has at various times past caused appellants to be arrested, and has instituted deportation proceedings against them, with the exception of appellant Lansburg, whose arrest has occurred but in whose case no deportation hearings have as yet been held. With regard to this particular appellant, however, the appellee threatens to proceed in the same manner as against the other appellants. No special reference to his case will be made hereinafter but he will for the purpose of this brief be treated as though in exactly the same status as the other appellants.

The deportation proceedings against appellants were commenced early in 1948, and prior to May 7, 1948. The proceedings were conducted in the usual manner followed by the Service; as such they were not in conformity with the procedural provisions of the Administrative Procedure Act. (5 USC § 1001 et seq., hereinafter called the Act.) Section 5 of the Act (5 USC § 1004) provides in part that "*In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing * * **" the officer who makes the recommended decision or initial decision of the agency shall be the hearing officer, and that in the conduct of the hearing he shall (1) not consult with any person or party on any fact in issue except upon notice

and opportunity for all parties to participate; (2) that he shall not be responsible to or subject to the supervision or direction of any investigating or prosecuting officer of the agency; (3) that no investigating or prosecuting officer shall participate (except as witness or counsel in public hearings) in the decision or recommended decision of any case in which he has performed investigating or prosecuting functions. The defendant and the Service have in the past conducted, and threatened in the future to conduct, hearings in appellants' cases without compliance with these requirements.

Section 7 of the Act (5 USC § 1006) provides that the hearing officer presiding at all hearings required by statute, shall be qualified and appointed in conformance with the provisions of section 11 of the Act. (5 USC § 1010.) Section 11 requires that such hearing officers (1) be assigned to cases in rotation; (2) that they be civil servants qualified and competent to preside at such hearings; (3) shall have no duties inconsistent with their duties as hearing officers; and (4) shall be subject to removal for good cause by the Civil Service Commission alone and only on the record and after a hearing.

The appellee has in the past held and threatens in the future to hold hearings before an officer or agent of the service, subject to his direction, who is neither appointed, assigned nor qualified in this manner. On the contrary the hearing officer assigned to appellants' cases by appellee was specially designated for the cases of appellants, is not impartial, is not qualified

or appointed in conformance with the Act, and has duties inconsistent with those of hearing officer.

He is subject to removal by the agency without opportunity for notice and hearing, and in particular is subject to dismissal without good cause in that he may be dismissed pursuant to the provisions of Executive Order 9835 (12 F.R. 1935) if in the opinion of the Loyalty Review Board of the agency or of the Attorney General there is reason to believe that he is disloyal to the United States Government. The appellants are charged in the deportation proceedings with membership in organizations determined by the Attorney General, in accordance with the Executive Order cited, to be communist, fascist or subversive, and with personal advocacy of the overthrow of the government of the United States. The issue before such hearing officer is therefore one in which he is not free to make his own determination of the truth of the allegations regarding the organizations to which appellants are alleged to belong, without at the same time contradicting his ultimate superior, and subjecting himself to possible dismissal on the ground of disloyalty.

The hearings in appellants' cases were recessed *sine die* in May, 1948, after appellants' attorneys had made objection to proceeding without compliance with the Act and had on May 7, 1948, renewed that objection with particular reference to the decision of the District Court for the District of Columbia (Goldsborough, J.) in the case of *Eisler v. Clark*, 77 F.S. 610. They were set for further hearings in October, 1948,

after the decision of the District Court for the District of Columbia (Holtsoff, J.) in *Wong Yang Sung v. Clark*, 80 F.S. 235. The first of these decisions held that the Act did apply, and granted an injunction similar to that prayed for here; the second held that the Act did not apply, and denied a similar injunction.

Appellants thereupon brought this action. By stipulation in open court, it was agreed that no further administrative proceedings would be had in appellants' deportation cases until the determination of this case.

In the District Court three major issues were argued and determined. The first was whether the Attorney General is a necessary party in this case. This was determined in the negative, on the authority of *Williams v. Fanning*, 332 U. S. 490, 92 L. Ed. 161.

The second was that appellants had not exhausted their administrative remedies and that the Court should exercise its discretion by refusing to entertain this case. This was determined against the appellee, the Court holding that review at this point was, under all the circumstances, proper.

Third, whether the Act applied, insofar as its procedural requirements were concerned, to deportation proceedings. This was determined in the negative, on the ground that the exception in section 7 of the Act (5 U.S.C. § 1006) included deportation and other immigration hearings. The exception in section 7 states that "*Nothing in this Chapter shall be deemed to supersede the conduct of specified classes of pro-*

ceedings in whole or in part by or before boards or other officers specially provided for by or designated pursuant to statute." The District Court here relied upon *Wong Yang Sung v. Clark, supra*, and other cases in accord.

The prayer for an injunction was denied, and on appellee's motion the complaint was dismissed. To these rulings appellants take exception and thereon prosecute this appeal.

The issues presented by this case are purely legal ones. With the exception of very brief testimony by the hearing officer assigned to hear the deportation cases of appellants, regarding his qualifications, the manner of his assignment to these cases, and his duties, no evidence was taken. Affidavits filed in support of the complaint were of course received, and appear in the transcript on appeal. No substantial conflict on the facts of the case developed.

The question thus presented is whether deportation proceedings fall within the exception to the operation of the Act, which is set forth in section 7 thereof. In the determination of this question it is necessary to inquire first whether deportation proceedings are within the provisions of section 5 of the Act, as adjudications "*required by statute to be determined on the record after opportunity for an agency hearing*". If this is determined in the affirmative, then the procedural requirements of section 5, particularly of section 5 (c), referring to the qualifications of hearing officers, and of section 6 (5 U.S.C. § 1005), apply to deportation hearings unless excepted by section

7(a). Finally, there is the question whether deportation proceedings are such adjudications as were intended by the Congress to be excluded from the operation of the Act, under the exception in section 7(a).

SUMMARY OF ARGUMENT.

I. The Court below erred in refusing an injunction and dismissing the complaint, because the deportation statute as interpreted by the Courts requires an adjudication after hearing and upon the record.

The Courts of the United States have consistently and for many years construed the deportation statutes as requiring a fair hearing and a decision on the record. This construction has been found by the Courts to be essential to sustaining the deportation statutes against the charge of unconstitutionality.

II. The congressional intent was to include deportation hearings within the procedural requirements of Section 7 of the Administrative Procedure Act.

(1) Although the statute has been interpreted as requiring a hearing, there is no statutory designation of a hearing, nor of hearing officers.

(2) The designation of immigrant inspectors contained in 8 USC 152 does not constitute such a designation of officers as is contemplated by the Administrative Procedure Act.

(3) The congressional history of the Administrative Procedure Act demonstrates that it was the intent of Congress to include deportation hearings.

(4) The construction of the Act by the Attorney General prior to its passage by Congress and his actions following its passage demonstrate that it was the intent of Congress, as understood by the Attorney General, to include deportation hearings within the Administrative Procedure Act.

ARGUMENT.

I. THE COURT BELOW ERRED IN REFUSING AN INJUNCTION AND DISMISSING THE COMPLAINT, BECAUSE THE DEPORTATION STATUTE AS INTERPRETED BY THE COURTS REQUIRES AN ADJUDICATION AFTER HEARING AND UPON THE RECORD.

The Courts of the United States have consistently and for many years construed the deportation statutes as requiring a fair hearing and a decision on the record. This construction has been found by the Courts to be essential to sustaining the deportation statutes against the charge of unconstitutionality.

Section 5 of the Administrative Procedure Act (5 USCA § 1004) (hereinafter referred to as the Act) makes it obligatory upon administrative agencies of the Federal Government to observe certain procedural requirements "*in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing*".

Although no question of the requirement of a hearing in deportation proceedings was raised by the appellee (defendant) below, the Service has heretofore taken the position that the Act does not apply because the statutes providing for deportation proceedings do not in terms require a hearing. See "The Federal Ad-

ministrative Procedure Act and the Immigration and Naturalization Service", an article by the late Commissioner, Ugo Carusi, in IV Immigration and Naturalization Service Monthly Review, 95, 103 (February 1947). In order to bring before the Court the relevant materials on this problem, a brief review of the cases in point is in order.

The uniform construction of the immigration statutes by the United States Supreme Court has been to the effect that although no hearing is required by the terms of the statute, the Constitution requires a hearing and the statute must be read as requiring a hearing in order to preserve it from unconstitutionality. Thus in the *Japanese Immigrant Cases*, 189 U.S. 186, 100, 101, the Court said:

"But this Court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution * * * Therefore, it is not competent for the Secretary of the Treasury or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where

the principles involved in due process of law are recognized.

*“This is the reasonable construction of the acts of Congress here in question * * ** In the case of all acts of Congress, such interpretation ought to be adopted as, without doing violence to the import of the words used, will bring them into harmony with the Constitution.” (Emphasis added.)

And in *Bridges v. Wixon*, 326 U.S. 135, 160, Mr. Justice Douglas remarked:

*“As construed and applied in this case, the statute calls for the deportation of Harry Bridges after a fair hearing * * *.”* (Emphasis added.)

Not only have the immigration statutes been construed as requiring a hearing, they have also been construed as requiring a determination on the record. In *Kwock Jan Fat v. White*, 253 U.S. 454, at 464, the Court said:

“The acts of Congress give great power to the Secretary of Labor over Chinese immigrants and persons of Chinese descent. It is a power to be administered, not arbitrarily and secretly, but fairly and openly, under the restraints of the tradition and principles of free government applicable where the fundamental rights of men are involved, regardless of their origin or race. It is the province of the Courts, in proceedings for review, within the limits amply defined in the cases cited, to prevent abuse of this extraordinary power, and this is possible only when a full record is preserved of the essentials on which the execu-

tive officers proceed to judgment. For failure to preserve such a record * * * the judgment in the case must be reversed.”

This indeed was the construction put upon the immigration acts by Justice Goldsborough in the *Eisler v. Clark*, 77 F.S. 610. He said,

“The courts have read due process into the Act, and due process means a hearing and * * * therefore a hearing is an integral part of the deportation act; in fact, just as much as if the Act itself in words stated that a hearing should be held.”

To the same effect, see *U. S. ex rel. Trinler v. Carusi*, 166 F. 2d 457. The Court in that case pointed out that the fact that judicial review had been judge-made out of the concept of due process, did not make it any less a qualification of the statute than if it had been stated in the words of the statute. Obviously, opportunity for a hearing and opportunity for judicial review stand on the same footing in this regard. The Court held further that in the light of the decision of the Supreme Court in the *Japanese Immigrant Cases*, *supra*, it must be concluded that Congress was aware of the requirement of a fair hearing when it wrote the present immigration law. The requirement must, therefore, be regarded as included within the Congressional intent.

In short, due process requires, and the courts have consistently construed the immigration statutes to require, that no alien may be deported from the

United States without opportunity for a fair hearing and a decision based upon the record made in that hearing. So far as the relevant provision of section 5 of the Act is concerned, therefore, the Act applies.

II. THE CONGRESSIONAL INTENT WAS TO INCLUDE DEPORTATION HEARINGS WITHIN THE PROCEDURAL REQUIREMENTS OF SECTION 7 OF THE ADMINISTRATIVE PROCEDURE ACT.

- (1) Although the statute has been interpreted as requiring a hearing, there is no statutory designation of a hearing, nor of hearing officers.

The section of the Act relied upon by appellees as designating officers for deportation hearings in such a manner as to bring deportation hearings within the exception in section 7(a) of the Act, is section 152 of Title 8, United States Code. That section does designate immigrant inspectors as the officers who are to make "the inspection, other than the physical and mental examination, of aliens, including those *seeking admission or readmission* to or the privilege of passing through or residing in the United States," with the exception of aliens excluded, who are to be examined by boards of special inquiry. The section contains other provisions empowering immigrant inspectors to take certain actions in connection with the examination of aliens seeking admission or readmission to the United States. That section, however, and every other section of the immigration laws may be examined most minutely without discovering anywhere

either any requirement of a hearing in deportation cases or any designation of immigrant inspectors for holding such hearings. *Naturally, where the statute does not provide for a hearing it can only by a tortured construction be said to designate officers to conduct a hearing.*

There is nothing inconsistent in the position of appellants here when they argue on the one hand that section 5 of the Act applies to deportation cases even though there is no clause or phrase in the deportation statutes which requires a hearing. It is well settled that statutes and all other statements of law have the force and effect ascribed to them by courts of competent jurisdiction, and no other effect. Since it has been determined that the statute requires a hearing in order to be constitutional, section 5 of the Act does apply to deportation hearings. But a judicial construction of the statute does not, and cannot, *add words to the statute*. In the absence of any words in the statute providing for a hearing and designating immigrant inspectors or other officers particularly named to hold hearings, the plain requirement of section 7 of the Act is not met.

That the designation of immigrant inspectors for the examination of aliens seeking admission does not constitute a designation of immigrant inspectors for all immigration and naturalization hearings is clear from the provisions of section 153 of Title 8, U. S. Code. That section provides for the appointment of boards of special inquiry who are to hold hearings

determining the right to enter the United States of applicants for admission. The section provides in part:

“Each board shall consist of three members, who shall be selected from such of the immigrant officials in the service as the Commissioner of Immigration and Naturalization, with the approval of the Attorney General, shall from time to time designate as qualified to serve on such boards.”

This Court can take judicial notice of the fact that there are in the service of the Commissioner of Immigration and Naturalization immigrant officials who are not immigrant inspectors and under the plain terms of section 153, any of these officials would be available for appointment to a board of special inquiry.

The decision of the Second Circuit in the case of *Azzolini v. Watkins*, 172 F. (2d) 897, refers to section 152 of 8 U. S. Code as covering deportation as well as exclusion. Assuming that the authority cited for this proposition supports it, the decision in the *Azzolini* case still applies only to the power of inspectors to administer oaths, take evidence and have books and records produced for inspection. This is not the equivalent of a provision for a hearing and, as the decided cases cited in the preceding section of this brief demonstrate, the contention of the Immigration Service has been that no hearing is required or provided for by the deportation statutes. See in this connection the article of the late Commissioner Carusi in IV Immigration and Naturalization Service

Manual Review 95 (February 1947), cited *supra*. In that article the late Commissioner based his argument that the Act did not apply to immigration proceedings in part upon the fact that there was no express provision for hearings in the statutes.

Whatever courts may conclude about the intention of Congress with regard to whether the Act was merely a codification of existing law, or whether it extended and broadened the law, it cannot fairly be denied that the Congressional intent and the words of the exception in section 7(a) of the Act require for the exclusion of any proceedings from the operations of the Act, *a clear and unequivocal designation of officers for the purpose of conducting hearings*.

A decision that immigrant inspectors are officers designated by statute to conduct deportation hearings, so as to exclude deportation hearings from the operation of the Act, will naturally raise the question, "What statutory designation of hearing?" There is none.

- (2) The designation of immigrant inspectors contained in 8 USC 152 does not constitute such a designation of officers as is contemplated by the Administrative Procedure Act.

The exception noted in the Act, in section 7 (5 USCA §1008) states that nothing in the Act shall be construed to apply to "*the conduct of specified classes of proceedings in whole or in part by or before boards or other officers specially provided for by or designated pursuant to statute*". The opinion of Judge Holtzoff in *Wong Yang Sung v. Tom Clark, et al.*,

Civil Action No. 3420, D.C., Dist. Col., July 28, 1948, affirmed but not yet reported, finds in section 152 of Title 8, U.S. Code, such a statutory provision as brings deportation proceedings within the Act.

Section 152, however, applies only to exclusion proceedings. It is true that it confers authority upon immigration inspectors to examine aliens at ports of entry "touching the right of any alien to enter, reenter, pass through or reside in the United States * * *". The opinion relied upon the term "reside in" in the quoted passage. It is perfectly clear, however, from the provisions of the immigration laws generally, that persons may *seek admission* to the United States for the purpose of residing therein. There is nothing whatever inconsistent in providing that such aliens may be examined with regard to their right to reside in the United States, in a section which is concerned with examination for purposes of *exclusion* and which has nothing whatever to do with *deportation*.

The differences between exclusion and deportation are clear. The alien who is only knocking at the door is a man with very few rights under the laws of the United States. The alien who is already lawfully resident here, as are the plaintiffs herein, has acquired a host of rights, privileges and immunities which are not possessed by one subject to exclusion. He may become a citizen. He may not be deported except for certain enumerated reasons and except after arrest upon a warrant setting forth the charges against him, and an administrative trial on the merits. One

who is subject to exclusion may, under Public Law 552, 80th Congress, and 8 CFR 150.57, be excluded if, in the opinion of the Attorney General, his admission would be prejudicial to the United States. And if the Attorney General relies upon confidential information, the alien may be excluded without a hearing. An alien legally resident in the United States is not deportable on the ground that he is mentally ill or has become a public charge. An alien seeking admission may be excluded on the ground that he is mentally ill or that he is likely to become a public charge. The list could be extended to considerable proportions. The difference between exclusion and deportation must in the last analysis depend upon the fact that when one becomes a resident of the United States he becomes entitled to the protection of its laws, except such as are reserved for citizens only. But when one is an alien who has not been admitted to the United States, he can seek grace alone, and while he has certain privileges, they are enforced on his behalf in the interest of preserving our scheme of government by laws, not men, and not because the alien is guarded and protected for his own sake.

The distinction is therefore of the utmost importance. A statute which designates officers for hearing exclusion cases is a far cry from a statute which designates officers for hearing deportation cases.

Even assuming that Judge Holtzoff's opinion is correct, and deportation hearings are "*specified classes*

*of proceedings * * * specially provided for by or designated pursuant to statute*”, this ruling would mean not that the Act as a whole does not apply to deportation proceedings, but only that a portion of section 7(a) does not apply. That portion of section 7(a) which requires that hearings be presided over by examiners appointed pursuant to section 11 would, if Judge Holtzoff is correct, not apply to deportation cases. But the provisions of section 5, that the hearing officers used must not be directed by investigative and prosecuting officials, nor prosecute and investigate in allied cases, and the provisions of section 11 requiring that hearing officers must be assigned in rotation, would still apply to deportation cases.

The defendant contends that these sections also have no application to him and his officers and admits that they do not intend to comply with them in the threatened hearings. That this is the construction which Judge Holtzoff placed upon his own decision is clear from the conclusions of law which he entered. These read:

“1. That Section 7(a) of the Administrative Procedure Act, (60 Stat. 243, Title 5 U.S.C., Section 1001), is not applicable to hearings held by the Immigration and Naturalization Service of the United States Department of Justice.

“2. That the petitioner is not unlawfully detained.

“3. That the petitioner is not entitled to be released from the custody of the respondents.”

Indeed, Judge Holtzoff in a prior and elaborate opinion in *U. S. ex rel. Lindenau v. Watkins*, 73 F. Supp. 216, held that deportation proceedings are subject to judicial review under §10 of the Act. The Court in that case was concerned with changes made by the Act in the scope of judicial review of deportation orders, and in the quantum of evidence necessary to support such orders, upon petition for habeas corpus. Judge Holtzoff discussed the provisions of §10, which he held to be the governing law, reviewing the congressional history of the Act, and concluding that it is now necessary for the courts to inquire into the substantiality of the evidence upon which the deportation hearing was based, and that the Act requires that such orders must be supported by "substantial evidence."

Returning to the exception in section 7(a), it may be asked whether immigration inspectors are "designated pursuant to statute" to bring them within the exception to the Act. Their designation in deportation cases is made pursuant to orders or regulations promulgated by the Attorney General and the Commissioner of Immigration, not by nor pursuant to statute. If such loose and inferential statutory authority for their appointment is sufficient to bring the case within the exception, then the Act would have no application to any regularly constituted and functioning administrative agency. All administrative agencies find some sanction and support in statutory authority for their existence and for the appointment of particular em-

ployees to particular tasks. Unless this is so, the acts of such employees are without any authority whatever.

If the exception in section 7(a) is to be construed as applying to every hearing officer or board for whose appointment some authority may be found, however inferential and however far removed, in some statute of the United States, then the purpose of the Act will be completely frustrated.

(3) The congressional history of the Administrative Procedure Act demonstrates that it was the intent of Congress to include deportation hearings.

The exception in § 7(a) was discussed by the Congress, as appears from the committee reports of both the House and the Senate. See Senate Committee Report, pp. 207, 216; House Committee Report, p. 268; and Senate Proceedings, p. 325. A typical excerpt is that of the House Committee Report, which, in commenting on this section, noted that (p. 268):

“The preservation of the ‘conduct of specified classes of proceedings by or before boards or other officers specially provided by or designated pursuant to statute’ is not a loophole for the avoidance of the examiner system; it is intended to preserve only special types of statutory hearing officers who contribute some special qualifications, as distinguished from examiners otherwise provided in the bill, and at the same time assure the parties fair and impartial procedure.” [Senate Document No. 248, 79th Cong., 2nd Session.]

The debate in both the House and the Senate emphasized the same view. Thus in the Senate, Senator

Pat McCarran, sponsor of the bill, reporting to the Senate on the provisions of the bill, remarked as follows:

“The committee has considered the possibility that the preservation in section 7(a) of the ‘conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute’ might prove to be a loophole for avoidance of the examiner system. If experience should prove this true in any real sense, corrective legislation would be or might be necessary. Therefore, the committee desires that Government agencies should be put on notice that the provision in question is not intended to permit agencies to avoid the use of examiners, but only to preserve special statutory types of hearing officers who contribute something more than examiners could contribute, and at the same time to assure the parties fair and impartial procedure.” [P. 325, Senate Document No. 248, *supra*.]

In the House, Mr. Walter, chairman of the House sub-committee which carefully considered the bill, discussed the provision as follows:

“This provision authorizes agencies, if they do not wish to hear cases themselves, to delegate the hearing function to the named types of presiding officers. It does not mean, however, that agencies are authorized—whether pursuant to the express authority of other statutes or not—to avoid the examiner system—set up in this bill and hereafter discussed—by assigning general employees or attorneys to hear cases individually or as boards.

In short, unless the agency or its members or some specially qualified statutory officer hears the case, an examiner qualified under section 11 of this bill must do so." [P. 364, Senate Document No. 248, *supra*.]

Another indication of the legislative intent is found at page 1456 of "Hearings Before a Sub-Committee of the Senate Committee on the Judiciary on S.674, S.675, and S.918, 77th Congress, First Session (1941)". It there appears that the provisions of §301 of S.675, 77th Congress, First Session, one of the precursors of the bill which finally became the Act, made the provisions of the bill apply to cases where "rights, duties, or other legal relations are required *by law* to be determined after opportunity for hearing, and, if a hearing be held, only upon the basis of a record made in the course of such hearing". [Emphasis added.] The then Attorney General, Biddle, suggested to the committee in hearings that "by law" was too broad and that "by statute or Constitution" should be substituted therefor. He said:

"In some cases said agencies have *ex gratia* by regulations imposed upon themselves requirements of formal procedure though the applicable statute makes no such requirement. In order to exclude the possibility that such procedures come within Title III, the amendment is desirable".

And in the Senate Judiciary Committee print of the bill, which later became the Act, the following statement regarding the "required by statute" phrase appeared:

“Limiting application of the sections to those cases in which statutes require a hearing is particularly significant, because thereby are excluded the great mass of administrative routine as well as pensions, claims, and a variety of similar matters in which Congress has usually intentionally or traditionally refrained from requiring an administrative hearing.” [Legislative History, p. 22.]

These items of legislative history demonstrate that the intent of Congress was not to require conformity with the Act in cases where the administrative action was not of such a nature that the agency was compelled by law to give a hearing even though the agency might decide to give a hearing of some sort. Deportation cases are not such cases as has been demonstrated above. The statutes, as construed by the courts and as required by the Constitution, make a hearing mandatory in deportation cases.

- (4) The construction of the Act by the Attorney General prior to its passage by Congress and his actions following its passage demonstrate that it was the intent of Congress as understood by the Attorney General, to include deportation hearings within the Administrative Procedure Act.**

In 1945, the Attorney General made an analysis of the proposed bill, which then contained the exception hereunder discussion, in precisely the same form. The Attorney General's report stated:

“Section 7. This section applies in those cases of statutory hearing which are required by sections 4 and 5 to be conducted pursuant to section 7. Subject to the numerous exceptions contained

in sections 4 and 5, they are cases in which an order or rule is to be made upon the basis of the record in a statutory hearing.

“Section 7(a). The subsection is not intended to disturb presently existing statutory provisions which explicitly provide for certain types of hearing officers. Among such are (1) joint hearings before officers of the Federal agencies and persons designated by one or more States, (2) where officers of more than one agency sit, (3) quota allotment cases under the Agricultural Adjustment Act of 1938, (4) marine casualty investigation boards, (5) registers of the General Land Office, (6) special boards set up to review the rights of disconnected servicemen (38 U.S.C. 693h) and the rights of veterans to special unemployment compensation (38 U.S.C. 696h), and (7) boards of employees authorized under the Interstate Commerce Act (49 U.S.C. 17 (2)).”

An examination of the agencies referred to by the Attorney General reveals that some of them are no longer in existence. Considering the quota allotment cases under the Agricultural Adjustment Act of 1938, however, the provisions are now substantially the same as they were at the time this analysis was made. The Agricultural Adjustment Act, which appears in Title 7, Chapter 35, of the United States Code, sets up a procedure for establishing farm marketing quotas for farmers of the particular crops covered by the Act. Section 1363 of Title 7 provides that any farmer who is dissatisfied with his quota may have the quota reviewed “by a local review committee composed of

three farmers appointed by the Secretary". The use of farmers as a portion of the legislative scheme here is resorted to in other sections of the Act. Farmers are used to form committees to set up quotas for areas, and to pass upon other problems of quota setting. Section 1363 carefully provides that the three farmers who shall review such a quota shall not include any member of the local committee which determined "the farm acreage allotment, normal yield, or the farm marketing quota for such farm."

The statutory provisions for setting up these committees of local farmers are found in section 1388 of Title 7, referring to sections 590h(b) and section 590k of Title 16, and also to sections 590g to 590i, 590j to 590q of Title 16. It is apparent from this precise statutory delineation that the groups who are to pass upon the questions arising in effectuating the purposes of the Act are to be men *familiar with local conditions*, and men *skilled in farming*. Thus 590h(b) of Title 16 provides in part:

"In determining the amount of any payment or grant measured by (1) or (2) the Secretary shall take into consideration the productivity of the land affected by the farming practices adopted during the year with respect to which such payment is made. In carrying out the provisions of this section in the continental United States, the Secretary is directed to utilize the services of local and State committees selected as hereinafter provided. The Secretary shall designate local administrative areas as units for administration of programs under this section. No such local area shall include more than one county or parts of

different counties. Farmers within any such local administrative area, and participating or co-operating in programs administered within such area, shall elect annually *from among their number* a local committee of not more than three members for such area and shall also elect annually *from among their number* a delegate to a county convention for the election of a county committee. The delegates from the various local areas in the county shall, in a county convention, elect, annually, the county committee for the county which shall consist of three members *who are farmers in the county*. The local committee shall select a secretary and may utilize the county agricultural extension agent for such purpose. The county committee shall select a secretary who may be the county agricultural extension agent. If such county agricultural extension agent shall not have been elected secretary of such committee, he shall be ex officio a member of the county committee. The county agricultural extension agent shall not have the power to vote. In any county in which there is only one local committee the local committee shall also be the county committee. In each State there shall be a State committee for the State composed of not less than three or more than five *farmers* who are legal residents of the State and who are appointed by the Secretary. The State director of the Agricultural Extension Service shall be ex officio a member of such State committee. The ex officio members of the county and State committees shall be in addition to the number of members of such committees hereinbefore specified. The Secretary shall make such regulations as are necessary relating to the selection and exercise of the func-

tions of the respective committees, and to the administration, through such committees, of such programs * * *." [Emphasis added.]

The careful statutory designation of the committees who are to perform certain specified acts, and the close relation between the personnel of the committees and the special skill and knowledge required to perform the committee functions, should be noted here.

The Attorney General refers also to marine casualty investigation boards. The provisions of Title 46 of U.S. Code, upon which the Attorney General's report was based, have since been changed. The functions which in 1945 were performed by marine casualty boards are now performed by the United States Coast Guard. As the provision stood in 1945, however, there was a statutory scheme involving investigation of marine casualties by local inspectors, employees of the Bureau of Marine Inspection and Navigation. Section 384 of Title 46 provided for the qualifications and appointment of local inspectors. The section stated:

"§384. *Qualifications and appointment of local inspectors.* The inspector of hulls shall be a person of good character and suitable qualifications and attainments to perform the services required of an inspector of hulls, *who from his practical knowledge of shipbuilding and navigation and the uses of steam in navigation is fully competent to make a reliable estimate of the strength, seaworthiness, and other qualities of the hulls of vessels and their equipment deemed essential to safety of life in their navigation; and the inspector of boilers shall be a person of good character*

and *suitable qualifications and attainments* to perform the services required of an inspector of boilers, who *from his knowledge and experience* of the duties of an engineer employed in navigating vessels by steam, and also of the construction and use of boilers, and machinery and appurtenances therewith connected, is able to form a reliable opinion of the strength, form, workmanship, and suitability of boilers and machinery to be employed, without hazard to life from imperfection in the material, workmanship, or arrangement of any part of such apparatus for steaming. The inspector of hulls and the inspector of boilers designated by the Secretary of Commerce shall, from the date of designation, constitute a board of local inspectors.” [Emphasis added.]

Section 239 of the same Title provided for investigation of misconduct of officers in cases of marine disasters.

The “registers of the General Land Office”, to which reference is made in the Attorney General’s report, no longer exist. In Title 43 of the United States Code, however, Chapter 4 set up a legislative scheme in which there was provision for a federal officer, designated a “Register”. This officer was charged with the duties of the sale of public lands and Indian lands. (Section 72 of Title 43.) He was by section 75 of the Title authorized to administer oaths. His precise duties did not clearly appear in the statute, but section 82, setting forth the fees and commissions which the register was allowed, gives some idea of the nature of his activities. It appears from

this section that he was required to accept homestead claims; to locate lands under Congressional grants for railroad and other purposes; to issue patents for mineral lands; to take testimony and certify records regarding claims to desert lands and homesteads. Section 87 provides that Registers shall upon application furnish plats or diagrams showing vacant lands and the lands that have been sold. In general, the Register appears to have been a public official of considerable importance during the period when there were vast areas of the public domain for sale or grant to individuals and corporations, when the Government was encouraging settlement of the West. This official was entrusted with a great deal of discretionary power and entitled to receive fees which would be used as his compensation. But he did not ordinarily sit as a hearing officer.

The Attorney General's report discusses the special boards set up to review the rights of disconnected servicemen in 38 U.S. Code §693h. As that section now stands, it provides for the establishment in the Army and Navy Departments of boards of review composed of five members each, whose duties are to review the type and nature of discharge and dismissal of ex-servicemen. The Act provides in part:

“Such review shall be based upon all available records of the service department relating to the person requesting such review, and such other evidence as may be presented by such persons. Witnesses shall be permitted to present testimony either in person or by affidavit and the person re-

questing review shall be allowed to appear before such board in person or by counsel * * * Such board shall have authority, except in the case of a discharge or dismissal by reason of the sentence of a general court martial, to change, correct, or modify any discharge or dismissal, and to issue a new discharge in accord with the facts presented to the board. The Articles of War and the Articles for the Government of the Navy are amended to authorize the Secretary of the Army and the Secretary of the Navy to establish such boards of review, the findings thereof to be final subject only to review by the Secretary of the Army or the Secretary of the Navy, respectively * * *."

Assuming that the provisions to which the Attorney General had reference were somewhat similar to these. It is to be noted that these boards of review were a portion of the military and naval establishments, and were specifically delegated to review the *military function* of discharging men from the services and to perform the *military function* of providing new and different discharges.

Finally, the Attorney General refers to the provisions of 49 U.S. Code § 17(a), relating to boards of employees authorized under the Interstate Commerce Act. Section 17(a) of the Title provides that:

"The Commission may by order direct that any of its work, business, or functions under any provision of law (except matters required to be referred to joint boards by section 305, and except functions vested in the Commission under this section), or any matter which shall have been or

may be referred to it by Congress or by either branch thereof, be assigned or referred to any division, to an individual Commissioner, or to a board to be composed of three or more eligible employees of the Commission (hereinafter in this section called a 'board') to be designated by such order, for action thereon, and the Commission may by order at any time amend, modify, supplement, or rescind any such assignment or reference. The following classes of employees shall be eligible for designation by the Commission to serve on such boards: examiners, directors or assistant directors of bureaus, chiefs of sections, and attorneys. *The assignment or reference, to divisions, of work, business, or functions relating to the lawfulness of rates, fares, or charges shall be made according to the character of regulation to be exercised and not according to the kind or class of the carriers involved or to the form or mode of transportation in which such carriers may be engaged * * *.*" [Emphasis added.]

The italicized portion above discloses that the employees who were to be assigned to particular tasks within the Commission were to be assigned in accordance with their particular knowledge and skill of the problems of rate making.

It may be seen that both the House Committee report and the Attorney General's analysis agree that one of the important classes of agencies to which the Act does not apply are those in which some particular skill or qualification is brought to the hearing by the statutory hearing officer. It has been suggested that the immigrant inspector is a person possessed of a

particular skill and knowledge not available outside the Service. Examination of section 155, the principal statute governing deportation proceedings, however, fails to support this suggestion. The question which is before the presiding inspector at a deportation hearing is of the sort generally heard before courts without any special qualifications or particular knowledge other than knowledge of the law. Below are listed seriatim the issues which may be before such a presiding inspector under the provisions of section 155:

(1) Whether within five years after entry an alien was at the time of entry a member of one or more classes excluded by law.

(2) Whether the entry of the alien was in violation of Chapter 6 of Title 8 of the United States Code or any other law of the United States.

(3) Whether the alien remains in the United States in violation of Chapter 6, or any other law of the United States.

(4) Whether the alien at any time after entry has been found advocating or teaching the unlawful destruction of property, anarchy, overthrow of the Government of the United States by force or violence, overthrow of all forms of law, or the assassination of public officials.

(5) Whether the alien has within five years after entry become a public charge from causes not affirmatively shown to have arisen subsequent to landing.

(6) Whether the alien has been sentenced to imprisonment for a term of one year or more because of conviction in this Country of a crime involving moral turpitude, committed within five years after his entry into the United States, or whether he has been more than once sentenced to such a term.

(7) Whether the alien is an inmate of or connected with the management of a house of prostitution, or practicing prostitution, or receiving, sharing in, or deriving benefits from any part of the earnings of any prostitute.

(8) Whether the alien manages or is employed by any or in connection with any house of prostitution or music or dance hall or resort habitually frequented by prostitutes, or whether he in any way assists or protects or promises to protect from arrest any prostitute; whether the alien has imported or attempted to import any person for purposes of prostitution or other immoral purpose.

(9) Whether the alien has been excluded and deported or arrested and deported as a prostitute or as a procurer, or as having been connected with the business of prostitution or importation for prostitution or other immoral purposes, and has returned and entered the United States.

(10) Whether the alien has been convicted and imprisoned for a violation of the provisions of section 138 of 8 U.S. Code.

(11) Whether the alien was convicted or admits the commission prior to entry of a felony or other crime involving moral turpitude.

(12) Whether at any time within three years after entry the alien entered the United States by water at any time or place other than that designated by immigration officials, or by land at any place other than one designated as a port of entry; or whether the alien entered without inspection.

(13) Whether a female alien has married an American citizen and is a member of the "sexually immoral classes."

(14) Whether an alien convicted of a crime involving moral turpitude has been pardoned or whether the judge who sentenced such alien for such crime did at the time of imposing judgment or passing sentence or within 30 days thereafter, after giving due notice to representatives of the state, make a recommendation to the Attorney General that such alien be not deported in pursuance of Chapter 6 of Title 8.

It is perfectly true that immigration law and regulations constitute a morass in which the lawyer not a specialist in the field may well become bogged down. It is true that immigrant inspectors and persons conducting hearings under the Act or otherwise could profitably be required to be familiar with this body of law and regulations. This is no more, however, than

may be said of a specialist in any of the recognized subdivisions of law. No special *skill* is required by a supervising inspector in a deportation case, but only a knowledge of the law.

Agreeing that a knowledge of immigration law and regulations might be a proper prerequisite for the appointment of a hearing inspector, this is by no means inconsistent with the spirit or the language of the Act. Section 11 of the Act (5 USCA §1010) provides for the appointment of "qualified and competent examiners"; and section 12 of the Act (5 USCA §1011), further provides "every agency is granted all authority necessary to comply with the requirements of this chapter through the issuance of rules or otherwise." The appointment of qualified examiners, acquainted with the law and the regulations, and their assignment in rotation in accordance with the provisions of the Act, is neither difficult nor prejudicial to the Government. Even if it were difficult, expensive, and from the point of view of the Government prejudicial, to provide for such hearing officers, if the alien is entitled to have them appointed, no argument based upon mere expediency can avail the Department. We are here concerned with Constitutional rights.

The legislative history of the Act makes it clear that Congress intended to exempt from the procedural provisions of the Act hearing officers who, by the nature of the adjudications they are required to make, must possess a particular skill or knowledge not available in persons without specialized training and experience. The Attorney General's analysis indicates that

in his view certain other exceptions were intended. These may be stated briefly as follows:

(1) Cases in which the agency employees occupy a particular position of power or authority, as in joint hearings before officers of Federal agencies and persons designated by one or more States. In such hearings the designated persons represent state and national sovereigns, and to a degree exercise the sovereign power of the United States and of their respective States. This would be true also where officers of more than one agency sit, exercising the authority of the particular agencies.

(2) Cases in which the hearing officer exercises a particular type of function which by law and practice has for a long period been excluded from the province of civil agencies, including civil courts. An example of this is the special boards set up to review the rights of disconnected servicemen. Here the hearing officers are empowered to perform the military functions of changing sentences passed upon servicemen during their period of military service, revoking military discharges and issuing new and different ones.

(3) Where the function to be exercised is one requiring a particular skill or knowledge. This is the exception discussed above. It is referred to by the Attorney General when he mentions marine casualty investigation boards, and quota allotment cases under the Agricultural Adjustment Act.

(4) Cases where the statutory designation is precise and clear, and the purpose for which such desig-

nation is made is one not inconsistent with the policy underlying the Act. An example of this is the Register of the General Land Office. This official, as he formerly existed, was an official designated in clear and precise terms by statute to perform functions which had little of the quasi-judicial nature which ordinarily characterizes administrative hearings. In the execution of his duties, he was unconcerned with adversary proceedings, and his orders and decisions were on matters requiring merely an interpretation of Government records, the same general sort of function as performed by county recorders in many States. The policy of the Act is to set forth the best procedure in cases where administrative agencies conduct adversary proceedings of a quasi-judicial nature. The Register of the General Land Office was clearly outside this policy.

As noted in the House Report, this bill is a result of about 10 years of study, during the course of which the Attorney General's Committee was set up to make an exhaustive survey of Federal agencies with a view to drafting just such an act as this one. The agencies studied included the Immigration and Naturalization Service of the Department of Justice. (P. 245, Legislative History).

The defendant here staunchly maintains that the Act does not apply to the Immigration Service. This is, of course, the position taken by the Attorney General in the *Eisler* case, *supra*, and in the *Trinler* case, *supra*. It is puzzling, therefore, to find that the Attorney General and the Service have for some time re-

garded the Act as applying and have been fulfilling its terms at least so far as section 2 (5 USCA §1002), is concerned. The Attorney General has been publishing in the Federal Register notice of proposed rule making in immigration and naturalization matters. (See for example, 13 Fed. Reg. 780, Feb. 20, 1948; also 13 Fed. Reg. 5494).

The Attorney General has also been complying with the provisions of the same section requiring publication of the administrative organization of the Service. (See 13 Fed. Reg. 1891, April 7, 1948, and also 13 Fed. Reg. 1991, April 14, 1948).

Nor is this the only indication that the Attorney General regards the Act as applicable to the Service. It is reported in "Interpreter Releases", an information service on immigration, naturalization, and the foreign born, published by the Common Council for American Unity, 20 West 40th Street, New York, N. Y., in Vol. XXV, No. 29, page 182, that:

"By request of the Administration, Mr. Fellows on May 24 introduced in the House a bill, H.R. 6652, which would except the immigration and nationality laws from most provisions of the Administrative Procedure Act of 1946. Mr. Revercomb, on May 26, introduced in the Senate an identical bill, S. 2755."

These bills had not been acted upon by the Congress up to the end of the session. See *ibid*, Vol. XXV, No. 37, pp. 248, 250. (Information on the introduction and subsequent history of these bills is available through the Interpreter Releases, and no other cita-

tion is given here because no reference to them is made in the Congressional Service). Thus, the Attorney General, whose orders bind the defendant, has on the one hand argued that the Act does not apply to the Service, and on the other has admitted its application by complying with it, and by seeking Congressional immunity from it.

CONCLUSION.

For ten years before the passage of the Administrative Procedure Act, the Attorney General and numerous congressmen were engaged in a thorough study of the problems presented by the sudden growth of administrative agencies in our Government. In the Act, the Congress codified what was believed to be the best, that is to say the fairest and most effective procedure, in cases of rule making, adjudication, and other administrative activities. Since the passage of the Act, its application to existing agencies has been resisted by the agencies. Not least among those who insist that this fairest and best procedure is not required of it, is the Immigration and Naturalization Service.

The arguments heretofore advanced by the Service to prove that the Act does not apply, have nothing whatever to do with the considerations that moved the Congress to enact this statute. That is to say, no attempt is made by the Service to show that it would be impossible, unnecessary, unwise, or prejudicial to the interests of the United States, if the Service were

required to meet the same standards of fairness as other agencies. The argument advanced depends almost entirely upon the ambiguity of certain sections of the Act. This in turn throws open the doors to inquiry into the intention of Congress in passing the Act.

Congress, in passing this Act, as in all controversial matters, can only by a fiction be said to have had any unified and common intention. Some of the Congressmen and Senators undoubtedly intended to require a uniform standard of fairness of all regular administrative agencies, and others doubtless intended something less than that. But in construing the Act, the Court must ascribe to Congress an intention both constitutional and reasonable. In the absence of any showing that it is unreasonable to require the Immigration Service to meet the standards of fairness required of other agencies, and in the absence of any showing that the Immigration Service by its present procedure satisfies the policy of the Act, there is nothing to move the Court to construe the Act as embodying a congressional intent to unreasonably exclude from the operation of the Act the Immigration and Naturalization Service. Such a construction of the Act, depending as it does upon a purely technical argument without regard for the broad policies which moved the proponents of the Act to fight for its passage over ten long years, would frustrate the purpose of the Act. It would be a conquest of the letter over the spirit, and the lawyers over the law.

Appellants respectfully submit that they are entitled to the same fair administrative procedure before the Immigration and Naturalization Service as they would receive before any other administrative agency of this Government. Such fair procedure can be obtained only if the Service is held to be bound by the provisions of the Administrative Procedure Act.

Dated, San Francisco, California,

May 23, 1949.

Respectfully submitted,

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No. 12,174

IN THE

United States Court of Appeals
For the Ninth Circuit

NAT YANISH, WILLIAM HEIKKILA, JOHN
DIAZ, HERMAN LANSBURG and FRANK
CARLSON,

Appellants,

VS.

I. F. WIXON, individually, and as Dis-
trict Director, Immigration and Natu-
ralization Service, Department of
Justice,

Appellee.

FILED

BRIEF FOR APPELLEE.

JUN 24 1948

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IN THE

**United States Court of Appeals
For the Ninth Circuit**

NAT YANISH, WILLIAM HEIKKILA, JOHN
DIAZ, HERMAN LANSBURG and FRANK
CARLSON,

Appellants,

vs.

I. F. WIXON, individually, and as Dis-
trict Director, Immigration and Natu-
ralization Service, Department of
Justice,

Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

The major issue in this case is clearly a legal question, not one of fact. Appellants urge by their appeal that all the provisions of the Administrative Procedure Act (5 U.S.C. 1001 et seq.) are applicable to deportation proceedings before the Immigration and Naturalization Service, and particularly that deportation hearings held by officers other than those designated under Section 11 (5 U.S.C. 1010) are null and void.

Appellee contends that the provisions of the Administrative Procedure Act, more particularly Sections 5, 7, 8, 10 and 11 (5 U.S.C. 1004, 1006, 1007, 1009 and 1010) are not applicable to deportation proceedings.

At all times since the filing of this complaint in the lower court the Immigration and Naturalization Service has been ready and willing to hold deportation hearings in each of the cases named in the action herein, under and in pursuance of what appellee considers to be the applicable Immigration and Naturalization laws and regulations.

None of the appellants in this case in their complaint alleges that at any time any one of them had been legally admitted to the United States. Warrants have been issued under authority of the Attorney General of the United States for the arrest of the appellants on the ground that they are now subject to deportation from the United States, and these warrants have been served upon each of the appellants by the appellee. Appellants are not now in custody but have been arrested and have been released on bond.

In the original complaint below I. F. Wixon was named as defendant, and in this appeal as appellee, as he was at the time District Director of the 13th Immigration District of the U. S. Immigration and Naturalization Service, which included the territory within the jurisdiction of the District Court and of this Court. He has, since May 1, 1949, been succeeded by Arthur J. Phelan, who is Acting District Director of said Immigration District. Appellee has always contended that I. F. Wixon, as District Director of the 13th Immigration District of the United States

Immigration and Naturalization Service, Department of Justice, was not a proper party to this action, and appellee insists, for the same reason, that Arthur J. Phelan, as Acting District Director, is not now a proper party, but has consented solely for the purpose of bringing the matter before the Court, that the name of Arthur J. Phelan, as Acting District Director be substituted in the place and stead of I. F. Wixon, District Director, who was named as defendant in the original action.

Each of the appellants was taken into custody by him under authority of a warrant from the Attorney General of the United States.

The deportation proceedings against the appellants commenced early in 1948, prior to May 7, 1948. The proceedings were conducted in the usual manner, prescribed by law and the regulations of the United States Immigration and Naturalization Service.

On October 6, 1948, the appellants sought to restrain the appellee from continuing deportation proceedings against the appellants, then in progress, on the grounds that each of them was entitled to a hearing under the provisions of 5 U.S.C. Sec. 1001, et seq. of the Administrative Procedure Act of June 11, 1946. At all times the appellee has been willing to accord the appellants hearings. After considering the arguments of counsel for both parties, and briefs submitted by them, the Court below, in a written opinion dated December 20, 1948, properly held that 5 U.S.C. Sec. 1006 has no application to proceedings for deportation of aliens under 8 U.S.C. Sec. 155. Thereafter the appellants sought appeal to this Court.

SUMMARY OF ARGUMENT.

1. At all times since May 7, 1948, the appellee has been willing and desirous of holding a hearing in connection with the deportation of each of the individual appellants under 8 U.S.C. 155.

2. That each and every one of the appellants, if and when taken into custody, has an adequate remedy in an application for a writ of habeas corpus.

3. That the Administrative Procedure Act of June 11, 1946 (5 U.S.C. 1001, et seq.) particularly Sec. 7 (5 U.S.C. 1006) has no application to hearings in deportation or exclusion proceedings under the immigration laws.

I. The Administrative Procedure Act did not create any additional right of judicial review in deportation cases.

II. The requirements of Sections 1004, 1006, 1007 and 1010 of the Administrative Procedure Act are not applicable to deportation proceedings.

(a) Deportation proceedings are not governed by Section 1004 of the Act.

(b) Deportation proceedings conducted by Immigration Inspectors are within the exception to Section 1006 of the Act.

4. That I. F. Wixon, individually and as District Director of the United States Immigration and Naturalization Service, Department of Justice, is not a proper defendant either individually or officially. It follows by corollary that Arthur J. Phelan, Acting Director of the United States Immigration and Nat-

uralization Service, Department of Justice, would also not be a proper defendant individually or officially.

5. That the complaint in this action states no cause of action as to I. F. Wixon, individually or officially, and since the name of Arthur J. Phelan has been substituted for that of I. F. Wixon, it states no cause of action as to Arthur J. Phelan, individually or officially.

6. That the appellants have not exhausted their legal administrative remedies.

ARGUMENT.

It is not believed that there is any substantial dispute between the parties as to the facts in this case. It appears that the issues in this case are solely issues of law.

AT ALL TIMES SINCE MAY 7, 1948, THE APPELLEE HAS BEEN WILLING AND DESIROUS OF HOLDING A HEARING IN CONNECTION WITH THE DEPORTATION OF EACH OF THE INDIVIDUAL APPELLANTS UNDER 8 U.S.C. 155.

Any delay in connection with the hearings since that date has been at the instance of each appellant.

2. THAT EACH AND EVERY ONE OF APPELLANTS IF AND WHEN TAKEN INTO CUSTODY HAS AN ADEQUATE REMEDY IN AN APPLICATION FOR A WRIT OF HABEAS CORPUS.

The Congress has an absolute and unqualified power to provide for the exclusion and deportation of any alien for any cause, and to prescribe the conditions under which an alien may enter or remain in the United States.¹ *It is a power inherent in sovereignty.*² Moreover, it may commit the administration and enforcement of such laws to the executive officers of the Government,³ who may make rules not inconsistent with such laws to carry out the statutes and facilitate their enforcement.⁴ Over no conceivable subject is the power of Congress more complete than that of regulating immigration.⁵

The deportation of aliens unlawfully in the United States is by statute committed to the Attorney Gen-

¹*Volpe v. Smith*, 289 U.S. 422 (1933); *Ng Fung Ho v. White*, 259 U.S. 276 (1922); *Bugajewitz v. Adams*, 228 U.S. 585, 591 (1913); *Zakonaite v. Wolf*, 226 U.S. 272 (1912); *Turner v. Williams*, 194 U.S. 279 (1904); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892); *The Chinese Exclusion Case*, 130 U.S. 581 (1889).

²*Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *The Chinese Exclusion Case*, 130 U.S. 581 (1889); *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892).

³*Low Wah Suey v. Backus*, 225 U.S. 460, 468 (1912); *United States v. Ju Toy*, 198 U.S. 253 (1905); *Turner v. Williams*, 194 U.S. 279 (1904); *The Japanese Immigrant Case*, 189 U.S. 86, 100 (1903); *Wong Wing v. United States*, 163 U.S. 228, 237 (1896); *Fong Yue Ting v. United States*, 149 U.S. 698, 707, 713 (1893).

⁴*Low Wah Suey v. Backus*, 225 U.S. 460 (1912); *Lum She You v. United States*, 82 F. (2d) 83 (C.C.A. 9, 1936); *Haff v. Tom Tang Shee*, 63 F. (2d) 191 (C.C.A. 9, 1933); *The Parthian*, 276 F. 903 (C.C.A. 2, 1921).

⁵*Oceanic Steam Navigation Company v. Stranahan*, 214 U.S. 320 (1909).

eral. Section 19 of the Immigration Act of 1917, as amended (39 Stat. 889-890; 54 Stat. 671-673; 56 Stat. 1044; 8 U.S.C. 155) provides that in deportation cases "the decision of the Attorney General shall be final." The statutes make no provision for judicial review and the finality of such administrative determinations has been repeatedly confirmed by the Courts since the earliest immigration cases.⁶

All attempts to secure direct judicial review or intervention in deportation cases have been flatly rejected by the Courts, regardless of the basis on which jurisdiction has been alleged. The Courts have held themselves without jurisdiction to entertain a bill in equity to cancel an order of deportation;⁷ a bill in equity for injunctions;⁸ a declaratory judgment;⁹ a bill in equity for declaratory judgment;¹⁰ a petition for writ or certiorari;¹¹ a petition for writ of prohibition;¹² a petition to compel return of evidence allegedly illegally procured.¹³

As recently as June 23, 1947, the Supreme Court of the United States cited the deportation case of *Bridges*

⁶*Nishimura Ekin v. United States*, 142 U.S. 631, 660 (1892); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

⁷*Fafalois v. Doak*, 50 F. (2d) 640 (App. D.C., 1931), certiorari denied 264 U.S. 651.

⁸*Dash v. Zurbrick*, 6 F. Supp. 390 (S.D. Mich., 1934); *Bata Shoe Co. v. Perkins*, 33 F. Supp. 508 (D.C., D.C., 1940).

⁹*Bata Shoe Co. v. Perkins*, 33 F. Supp. 508 (D.C., D.C., 1940).

¹⁰*Darabi v. Northrup*, 54 F. (2d) 70 (C.C.A. 6, 1931).

¹¹*In re Ban*, 21 F. (2d) 1009 (W.D., N.Y., 1927).

¹²*Poliszek v. Doak*, 57 F. (2d) 430 (App. D.C., 1932); *Kabadian v. Doak*, 65 F. (2d) 202 (App. D.C., 1933).

¹³*Impiriale v. Perkins*, 66 F. (2d) 805 (App. D.C., 1933), certiorari denied 290 U.S. 690.

v. Wixon, 326 U.S. 135 (1945) as an instance "where the order of the agency under which petitioner was detained was not subject to judicial review." (See *Sunal v. Large*, 67 Sup. Ct. 1588, 1590 footnote 3.)

The Courts, of course, have passed upon deportation cases in habeas corpus proceedings. Habeas corpus, however, does not provide a direct judicial review, such as is provided by appeal or writ of error. Habeas corpus is not a proceeding in the original suit, but is an independent civil suit.¹⁴ It is a collateral review.¹⁵ It stems, not from any right of judicial review, but from the due process clause of the Fifth Amendment to the Federal Constitution. Its purpose is to inquire into the cause of restraint of liberty,¹⁶ and it is not available to one who, though anticipating arrest is not yet in custody.¹⁷ It is not available as a matter of right, and the Court may refuse to issue the writ when it appears from the petition that the party is not entitled thereto.¹⁸

Moreover, the scope of the judicial review on habeas corpus is extremely narrow. The administrative findings of fact are conclusive, if supported by some evidence of probative value, and are not open to attack

¹⁴*Biddle v. Dyche*, 262 U.S. 333 (1923).

¹⁵*Vajtauer v. Commissioner*, 273 U.S. 103 (1927).

¹⁶(28 U.S.C. Chap. 153.)

¹⁷*Wales v. Whitney*, 114 U.S. 564 (1885); *Stallings v. Splain*, 253 U.S. 339 (1920); *Sibray v. United States*, 185 Fed. 401 (C.C.A. 3, 1911); *Ex parte Musci*, 1 F. Supp. 587 (S.D., N.Y., 1922); *Dess v. Lindsley*, 53 F. Supp. 427 (E.D. Ill., 1944).

¹⁸(28 U.S.C. Chap. 153; *Walker v. Johnston*, 312 U.S. 275 (1941).)

merely by showing that they are wrong.¹⁹ The Courts do review the administrative conclusions of law involving interpretation of the statutory grounds for deportation,²⁰ since the administrative authorities have no power to deport for a ground not listed in the statutes. Similarly, the Courts on habeas corpus will determine a petitioner's charge that the administrative hearing was unfair,²¹ or that he has been in custody for an unreasonable length of time.²²

The immigration statutes contemplate that the administrative determinations, when made within the scope of the statutory authority, shall be final. Where the immigration officials have exceeded or abused their authority, the writ or habeas corpus provides "an adequate and complete remedy."²³ Narrow in scope as it is, therefore, the review by habeas corpus is "the only available procedure to determine whether the immigration authorities have exceeded or abused their power."²⁴

In the case of

Valenti v. Clark, 83 F. Supp. 167,
involving an action for declaratory judgment, that the plaintiff therein, who was a resident alien, was not subject to deportation, the Court stated:

¹⁹*Vajtauer v. Commissioner*, 273 U.S. 103 (1927); *Tisi v. Tod*, 264 U.S. 109, 133 (1924).

²⁰*Mahler v. Eby*, 264 U.S. 32 (1924); *Kessler v. Strecker*, 307 U.S. 22 (1939); *Bridges v. Wixon*, 326 U.S. 135 (1945).

²¹*Tod v. Waldman*, 266 U.S. 113 (1924).

²²*Ross v. Wallis*, 279 Fed. 401 (C.C.A. 2, 1922).

²³*Fafalios v. Doak*, 50 F. (2d) 640 (App. D.C., 1931), certiorari denied 264 U.S. 651.

²⁴*Wong Sun v. Fluckey*, 288 Fed. 989, 994 (N.D., Ohio, 1922).

“Before reaching this question however, there is a very serious problem involved as to whether the plaintiff has pursued a remedy which may be granted him by this Court. Without doubt the plaintiff may secure a review of the action of the Commissioner of Immigration in the case that his deportation is ordered, by applying for a writ of habeas corpus in the district in which the plaintiff is held in custody. In this case that is the Southern District of New York.

“The court is of the opinion that an action for declaratory judgment is not suitable and does not lie in this district to review the action of the Attorney General in directing deportation.”

3. THAT THE ADMINISTRATIVE PROCEDURE ACT OF JUNE 11, 1946 (5 U.S.C. 1001 et seq.) PARTICULARLY SEC. 7 (5 U.S.C. 1006) HAS NO APPLICATION TO HEARINGS IN DEPORTATION OR EXCLUSION PROCEEDINGS UNDER THE IMMIGRATION LAWS.

I. THE ADMINISTRATIVE PROCEDURE ACT DID NOT CREATE ANY ADDITIONAL RIGHT OF JUDICIAL REVIEW IN DEPORTATION CASES.

Section 10 of the Administrative Procedure Act provides, *inter alia*:²⁵

“Except so far as (1) *Statutes preclude judicial review* or (2) agency action is by law committed to agency discretion—

(a) RIGHT OF REVIEW—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action

²⁵The full text of Sec. 10 (5 U.S.C.A. 1009) appears in the appendix hereto.

within the meaning of any relevant statute, shall be entitled to judicial review thereof.” (*Italics supplied.*)

The first question to be determined, then, is whether the deportation statute itself precludes judicial review.

The deportation statute precludes judicial review.

At the outset, it is clear that Congress did not intend to confer the right of review described in Section 10 indiscriminately upon any one aggrieved by any administrative agency action. Even assuming that Section 10 does create a new or additional right of judicial review, the opening sentence by its very terms withholds such right of review where the statute administered by the agency precludes judicial review.²⁶

To preclude judicial review, it is not essential that the statute should state, in so many words, “Judicial review is precluded.” Many statutes contain no ref-

²⁶See Senate Document No. 248, 79th Congress, 2d Session, which contains the legislative history of the Administrative Procedure Act. In discussing provisions of the measure in Congress, Senator McCarran, co-sponsor of the enacting legislation, made the following significant comment as reported at page 311, regarding the opening language of Section 10:

Mr. McCarran. “Mr. President, let me say, in answer to the able Senator that the thought uppermost in presenting this bill is that where an agency without authority or by caprice makes a decision, then it is subject to review.

“But in answer to the first part of the Senator’s question—namely, where a review is precluded by law—we do not interfere with the status, anywhere in this bill. Substantive law, law enacted by statute by the Congress of the United States, granting a review or denying a review is not interfered with by this bill. *We are not setting ourselves up to abrogate acts of Congress.*” (*Italics added.*)

erence, express or implied, to judicial review. While it is not to be lightly assumed that the silence of the statutes bars from the Courts an otherwise justiciable issue,²⁷ such statute may indicate on its face a purpose to limit or even preclude review.

Thus, in *American Federation of Labor v. National Labor Relations Board*²⁸ it was held that a certification by the Board of a bargaining representative under Section 9(c) of the Wagner Act is not reviewable by the Courts under Section 10(f) of the Act, the latter providing only for judicial review of a "final order." The Court stated:

"The statute on its face thus indicates a purpose to limit review afforded by Section 10 to orders of the Board prohibiting unfair labor practices, a purpose and construction which its legislative history confirms."

Similarly, in *Switchman's Union of North America v. National Mediation Board*,²⁹ the Court held that there was no right of judicial review of the Board's certification of bargaining representatives under Section 2(9) of the Railway Labor Act. The statute does not expressly provide that such certification is conclusive, but the Court construed the failure of the statute to provide for judicial review, in the light of the general pattern of the Act, as evincing a Congressional intent to make the administrative action final. The Court went on to state (at p. 303):

²⁷*Stark v. Wickard*, 321 U.S. 288, 309 (1944).

²⁸308 U.S. 401 (1940).

²⁹330 U.S. 297 (1943).

“The fact that the certificate of the Mediation Board is conclusive is of course of no ground for judicial review. *Great Northern Ry. Co. v. United States*, 277 U.S. 172, 182, 48 S. Ct. 466, 467, 72 L. Ed. 836. Congress has long delegated to executive officers or executive agencies the determination of complicated questions of fact and of law. And where no judicial review was provided by Congress this court has often refused to furnish one even where questions of law might be involved. See *State of Louisiana v. McAdoo*, 234 U.S. 627, 633, 34 S. Ct. 938, 490, 58 L. Ed. 1506; *United States v. George S. Bush & Co.*, 310 U.S. 371, 60 S. Ct. 944, 84 L. Ed. 1259; *Work v. U. S. ex rel. Rivee*, 267 U.S. 175, 45 S. Ct. 252, 69 L. Ed. 561; *United States v. Babcock*, supra. We need not determine the full reach of that rule. See *Bates & Guild Co. v. Payne*, 194 U.S. 106, 24 S. Ct. 595, 48 L. Ed. 894; *Houston v. St. Louis Independent Packing Co.*, 249 U.S. 479, 39 S. Ct. 332, 63 L. Ed. 717. But its application here is most appropriate by reason of the pattern of this Act.”

In the case of *Trinler v. Carusi*,³⁰ Judge McGranery also referred to the case of *Estop v. United States*,³¹ as meriting consideration.

He said:

“The Supreme Court there construed section 11 of the Selective Training and Service Act of 1940, 50 U.S.C.A. 311, to allow a defendant, indicted for a violation of the Act to attack a local board’s

³⁰72 Fed. Supp. 193; reversed 166 F. (2d) 457 and later abated 168 F. (2d) 1014. (Full discussion on p. 23 hereof.)

³¹327 U.S. 144.

induction order, even though section 10(a)(2) of that Act states that the 'decisions of such local boards shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe.' It construed the words 'shall be final' to limit the scope, rather than the right, of review of local board action taken under the Act. *Estop v. United States*, supra, at 122. However, the Court feels that this decision is not controlling here. The proceedings of which Estop successfully sought review by means other than habeas corpus was a criminal one, and this was, in large part, the basis of the decision. *Estop v. United States*, supra, at 122. The deportation proceeding of which petitioner in the instant case seeks review is civil in nature. *Bikolumsky v. Tod*, 263 U.S. 149. Moreover, the concrete issue in the instant case is what Congress intended thirty years ago on the question of review of deportation orders and whether the Administrative Procedure Act effects a change. Its original intent has been made clear by an unbroken line of decisions denying the sort of review prayed for in the instant case, and, significant to the inquiry into Congressional intent in the Administrative Procedure Act is the statement of the Attorney General found in Senate Document No. 248, supra, at p. 415 * * *³²

Also for purpose of comparative analogy between the provisions of Section 19 of the Immigration Act of 1917 (8 U.S.C. 155) stating that the decision of the Attorney General shall be final, and the summary

³²The Attorney General's statement referred to in the opinion is set forth at pages 20-21 of this brief.

power granted under the Alien Enemy Act of 1798, which empowers the President, whenever there is a "declared war" between the United States and any foreign country, to provide for the removal of alien enemies from the United States, it is significant to observe that in the case of *Ludecke v. Watkins*, 335 U. S. 160, the Supreme Court said, with reference to the Alien Enemy Act there solely involved:

"As Congress explicitly recognized in the recent Administrative Procedure Act, some statutes 'preclude judicial review.' Act of June 11, 1946, Sec. 10, 60 Stat. 237, 243. Barring questions of interpretation and constitutionality, the Alien Enemy Act of 1798 is such a statute. Its terms, purpose, and construction leave no doubt. The language employed by the Fifth Congress could hardly be made clearer, or be rendered doubtful, by the incomplete and not always dependable accounts we have of debates in the early Congress. (Footnote omitted.) That such was the scope of the Act is established by controlling contemporaneous construction * * * We would so read the Act if it came before us without the impressive gloss of history."

Finally, the term "statute," as used in the Administrative Procedure Act, in its different portions, may mean either a specific provision of statute or one embodied by judicial construction. Thus in Section 10(b) of the Act, the term "by law" was substituted for the words "by statute" as contained in the bill originally introduced, in order to insure that the statutory procedure would be exclusive not only where the statutes expressly so required in terms but where it was so

construed as well (Senate Document No. 248, 79th Cong., 2d Sess. pp. 36-37, 212-213, 276.) On the other hand, the term "statute," as used in the introductory clause of Section 10 excluding judicial review where "statute" precludes such review, includes not only cases where judicial review is expressly precluded but those in which the statute is so construed as well, as is clear from the deliberate omission of the word "expressly" from the bill as enacted (Sen. Doc. 248, *supra*, p. 160—The citation is to Section 10 of H.R. 1203, as originally introduced, the text of which was identical with S. 7 (Sen. Doc. 248, *supra*, p. 11) which in terms excepted from the judicial review provisions, cases in which the "statutes expressly precluded" such review).

Upon the whole of the foregoing there is sound basis for concluding that the immigration statute precludes judicial review, as that term is properly understood. The conclusiveness of the administrative determination is not dependent on inference and it does not require a sweeping analysis of the entire statutory pattern to ascertain the legislative intent in this regard. The Congressional intent to forbid judicial review is expressed in terms which are specific, clear and unmistakable: "The decision of the Attorney General shall be final" (Section 19, Immigration Act of 1917, 8 U.S.C. 155). In the face of so explicit an expression, it may seem superfluous to point to the unanimity with which the Courts have thus far denied judicial review in deportation proceedings.

Section 10 of the Administrative Procedure Act is a restatement of existing law.

Even if the immigration statute did not preclude judicial review, an analysis of Section 10 indicates that, far from creating a new or amplifying an existing right or form of review, it merely restates in statutory language the present doctrines of judicial review.

Subsection (a) of Sec. 10.

Section 10 in substance, states who is entitled to judicial review, prescribes the form of review proceedings, defines what actions are reviewable, states the interim relief available and defines the scope of review. Subsection (a), which defines the right of review, does not purport to create any new right of review. In commenting on this subsection in the bill (S.7) which later was enacted as the Administrative Procedure Act, the Attorney General stated, "This reflects existing law." (Senate Document No. 248, 79th Congress 2d Session, p. 230.) Under existing law, a person suffering legal wrong in deportation proceedings (that is, one who is unlawfully detained by the immigration authorities) is entitled to relief only by way of habeas corpus. A person to whom subsection (a) is applicable is entitled to judicial review in the form prescribed by subsection (b). Thus, assuming that deportation proceedings are not within the exception to Section 10, and assuming that a person ordered deported is entitled to judicial review under subsection (a), we must turn to subsection (b) to determine the applicable form of proceeding for judicial review.

Subsection (b) of Sec. 10.

Analysis of subsection (b) reveals that it, too, is a restatement of existing law and does not purport to create any new form or vehicle of judicial review. As pointed out in the Senate Judiciary Committee Print (Senate Document No. 248, *supra*, pp. 36-37) with respect to subsection (b):

“The first sentence states the general situation, that methods of review are ‘of two kinds: (a) those contained in statutes and (b) those developed by the courts in the absence of legislation * * * The non-statutory remedies * * * are available * * * where the remedy provided by statute is not an adequate substitute or does not include the particular situation involved.’ ”

In commenting on this subsection, the Attorney General stated (Senate Document No. 248, *supra*, p. 230):

“Section 10(b): This subsection requires that where a specific statutory method is provided for reviewing a given type of case in the courts, that procedure shall be used. If there is no such procedure, or if the procedure is inadequate (i.e., where under existing law a court would regard the special statutory procedure as inadequate and would grant another form of relief), then any applicable procedure, such as prohibitory or mandatory injunction, declaratory judgment, or habeas corpus is available.”

In short, where the statute administered by the agency prescribes a form of judicial review, that is the form to be employed. If the statute fails to provide the form of review, or the statutory form is inadequate, then any person entitled to judicial review

is relegated to the *applicable* form of review heretofore developed by the Courts, whether it be a common law writ or other traditional method of review. Subsection (b), by its terms, does not purport to create any new form of review, such as a "Petition for Review". Where there is an applicable and adequate form of review, whether statutory or traditional, that is the form to be used.

The deportation statute, as heretofore pointed out, contains no provisions for judicial review. Habeas corpus is the applicable and exclusive form of review in deportation cases.³³ The fact that detention is a prerequisite to the issuance of the writ does not render it the less adequate; the fact that the alien prefers a judicial determination without surrendering himself into custody does not warrant the Courts to create a new or employ another form of review.³⁴

The scope of subsection (b) was clearly expressed by Congressman Francis E. Walter, Chairman of the Sub-committee of the Committee on the Judiciary which sponsored this legislation, on the floor of the House on May 24, 1946, shortly before the bill's enactment (Senate Document No. 248, *supra*, p. 369):

"The provisions summarize the situation as it is now generally understood. The section does not disturb special proceedings which Congress has provided, nor does it disturb the venue arrange-

³³*Kabadian v. Doak*, 65 F. (2d) 202 (App. D.C., 1933), certiorari denied 290 U.S. 661; *In re Ban*, 21 F. (2d) 1009 (W.D., N.Y., 1927); *Wong Sun v. Fluckey*, 288 Fed. 989, 994 (N.D., Ohio, 1922).

³⁴*Fafalios v. Doak*, 50 F. (2d) 640 (App. D.C., 1931), certiorari denied 264 U.S. 651.

ments under existing law. *It does, however, constitute a statutory adoption of traditional forms of action in cases where Congress had made no contrary provision for judicial review.*" (Italics supplied.)

Applied to deportation cases, this means simply that habeas corpus, which heretofore has been recognized only by the courts as the traditional form of review, now has Congressional sanction as the appropriate remedy.

Subsection (c) of Sec. 10.

Subsection (c) sets forth what actions of administrative agencies are reviewable by the Courts, and states that "every final agency action for which there is no other adequate remedy in any Court shall be subject to judicial review." This language must be read in conjunction with the other parts of Section 10. When so read, it is clear that this subsection defines and restricts the types of action subject to review, rather than creating any new right of review. The types of agency action so reviewable, of course, are reviewable in the manner prescribed by the subsection (b).

* * *

Summing up Section 10 in its entirety, we can think of no more appropriate comment than the statement of the Attorney General, placed in the Congressional Record on May 25, 1946, by Congressman Sam Hobbs (Senate Document No. 248, supra, p. 415):

"Section 10 as to judicial review does not, in my view, make any real changes in existing law. This section in general declares the existing law con-

cerning judicial review. It is an attempt to restate in exact statutory language the doctrine of judicial review as expounded in various statutes and as interpreted by the Supreme Court. I know that some agencies are quite concerned about the phraseology used in section 10 for fear that it will change the existing doctrine of judicial review which has been settled for the particular agency concerned. I feel sure that should this section be given the interpretation which is intended, namely, that it is merely a restatement of existing law, there should be no difficulty for any agency. We may in a sense look at section 10 as an attempt by Congress to place into statutory language existing methods of review.”

Court decisions.

This view of the Attorney General was sustained by the United States District Court for the District of Massachusetts in *Olin Industries, Inc. v. National Labor Relations Board*.³⁵ There an injunction was sought against the N.L.R.B. and jurisdiction was alleged under Section 10 of the Administrative Procedure Act. In dismissing the complaint, the Court stated (at p. 228):

“Both the terms of this section and its legislative history, make it clear that Section 10 is merely declaratory of the existing law of judicial review and that it neither confers jurisdiction on this court above and beyond that which it already has, nor grants to aggrieved parties any rights they did not have under the National Labor Relations Act.”

³⁵72 F. Supp. 225 (1947).

In *Hearst Radio, Inc. v. Federal Communications Commission*, United States District Court, District of Columbia, July 3, 1947,³⁶ the Court, in granting the Government's motion to dismiss the complaint for review of an order instituting a hearing, said that:

“* * * Here section 402(b) of the Communications Act affords the means of judicial review. *I do not think the Administrative Procedure Act is intended to enlarge the methods or scope of such review, and in my opinion it would be stretching the Declaratory Judgment Act out of all reason to resort to its use as a means of meddling in the proceedings now pending before the Commission* * * *” (Emphasis supplied.)

The Administrative Procedure Act was referred to in an immigration case, *U. S. ex rel. Von Kleczowski v. Watkins*,³⁷ wherein the Court stated (at p. 438):

“Suffice it to say that Congress has not entrusted to the courts, in the immigration laws, the power to weigh the merit or demerit of those who knock at our doors for admission, or of those who are found, by fair administrative proceedings, to be deportable. The solitary exception (8 U.S.C.A. 155 (a)) only confirms the generality of the rule. *The power so specifically withheld was not conferred by the general language of the Administrative Procedure Act, Public Law 404, 79th Congress, Section 10(c) 5 U.S.C.A. 1009 (c).*” (Italics supplied.)

³⁶73 F. Supp. 308 (D.C., D.C., 1947), affirmed 167 F. (2d) 225 (App. D.C., 1948).

³⁷71 F. Supp. 428 (S.D., N.Y., 1947).

In one of the first cases solely involving the applicability of Section 10 of the Administrative Procedure Act to review deportation determinations³⁸ the District Court in dismissing plaintiff's petition for review under that section stated that:

"Against the background of the deportation process, the source of the power and its political and international connotations, the petitioner's status as a visitor on this nation's terms, the unanimous refusal of the courts to allow direct review of deportation orders in the past, and the possible ill effects inherent in a contrary course upon efficient handling of the immigration laws and judicial administration of crowded dockets, the court feels that to impute Congressional intent to allow the petition in the instant case would be an uncalled for interference with the administrative process. Since 8 U.S.C. 155 limits judicial review of deportation orders, Section 10 of the Administrative Procedure Act is, by its terms, inapplicable. Accordingly petitioner's bill of review is dismissed."

In reversing the District Court on February 16, 1948, the Third Circuit Court of Appeal took the view that under the Administrative Procedure Act plaintiff *Trinler* was entitled to have judicial review as one adversely affected by a deportation order after its promulgation but before he had been taken

³⁸*Trinler v. Carusi*, 72 Fed. Supp. 193, reversed in *Trinler v. Carusi*, Third Circuit, February 16, 1948, 166 F. (2d) 457, and later abated by decision of the same Circuit on July 8, 1948, 168 F. (2d) 1014, which vacated its judgment of February 16, 1948, and the judgment of the Court below, and remanded the cause to the District Court with order to dismiss the cause as abated.

into custody. But Circuit Judge O'Connell dissented, stating (p. 462) that:

"In the absence of Congressional history indicating an intent to broaden the scope of judicial review so as to include proceedings inherently political such as those here involved, *Fong Yue Ting v. United States*, 1893, 149 U.S. 698, 13 S. Ct. 1016, 37 L. Ed. 905, I am of the opinion that the finality clause of the Immigration Act of 1917 is within the excepting clause with which Section 10 of the Administrative Procedure Act opens. As recently as February 9, 1948, the Supreme Court has said: 'This Court long has held that statutes which employ broad terms to confer power of judicial review are not always to be read literally. Where Congress has authorized review of "any order" or used other equally inclusive terms, courts have declined the opportunity to magnify their jurisdiction, by self-denying constructions which do not subject to judicial control orders which, from their nature, from the context of the Act, or from the relation of judicial power to the subject-matter, are inappropriate for review.' *Chicago and Southern Air Lines, Inc. v. Waterman S. S. Corp.*, 1948, 68 S. Ct. 431, 433. I believe that the instant case calls for application of that principle. (Cf. *International Union v. Bradley*, D.C. 75 F. Supp. 394.)

"In *Sunal v. Large*, 1947, 332 U.S. 174, at 177, 67 S. Ct. 1588, at 1590, footnote 3, the Supreme Court recently said, 'We therefore lay to one side cases such as *Bridges v. Wixon*, 326 U.S. 135, 65 S. Ct. 1443, 89 L. Ed. 2193; * * * where the order of the agency under which petitioner was detained was not subject to judicial review.' (Cases deny-

ing forms of relief other than habeas corpus include: *In re Ban*, W.D., N.Y., 1927, 21 F. (2d) 1009, petition for writ of certiorari; *Fafalios v. Doak*, 60 App. D.C. 215, 50 F. (2d) 640; bill in equity to cancel deportation order, certiorari denied 1931, 284 U.S. 651, 52 S. Ct. 31, 76 L. Ed. 552; *Darabi v. Northrup*, 6 Cir., 1931, 54 F. (2d) 70; bill in equity for declaratory judgment; *Poliszek v. Doak*, 1932, 61 App. D.C. 64, 57 F. (2d) 430; petition for writ of prohibition; *Kabadian v. Doak*, 1933, 62 App. D.C. 114, 65 F. (2d) 202; petition for writ of prohibition, certiorari denied 290 U.S. 661, 54 S. Ct. 76, 78 L. Ed. 572; *Impiriale v. Perkins*, 1933, 62 App. D.C. 279, 66 F. (2d) 805; petition to compel return of evidence, certiorari denied 290 U.S. 690, 54 S. Ct. 126, 78 L. Ed. 594; *Rish v. Zurbrick*, E.D., Mich., 1934, 6 F. Supp. 390; bill in equity for injunction, affirmed on another ground, 6 Cir., 1935, 75 F. (2d) 934; and *Bata Shoe Co. v. Perkins*, D.C., D.C. 1940, 33 F. Supp. 508; bill in equity for injunction. See also *Lai To Hong v. Ebey*, 7 Cir., 1928, 25 F. (2d) 714, 716; *Daskaloff v. Zurbrick*, 6 Cir., 1939, 103 F. (2d) 579, 581; and *Kessler v. Strecker*, 1939, 307 U.S. 22, 34, 59 S.Ct. 394, 83 L. Ed. 1982.) From the foregoing, it seems reasonable to me to infer that habeas corpus proceedings heretofore have not been considered 'judicial review.' This analysis is strengthened by *Ex parte Tom Tong*, 1883, 108 U.S. 556, 559, 560, 2 S. Ct. 871, 872, 27 L. Ed. 826, in which it was stated that 'The prosecution against him (petitioner for a writ of habeas corpus) is a criminal prosecution, but the writ of habeas corpus which he has obtained is not a proceeding in that prosecution. On the contrary, it is a new

suit brought by him to enforce a civil right, which he claims * * *.' Consequently, I am impelled to the conclusion that the statutory mandate according finality to the decisions of the Attorney General remains unimpaired.

"Moreover, since judicial review under the Administrative Procedure Act permits at least an inquiry into whether the decision is supported by 'substantial evidence,' I find some difficulty in reconciling such inquiry with the finality mandate of Section 19 of the Immigration Act of 1917.

"Accordingly, I think the judgment of the lower court should be affirmed."

Had the Circuit Court's decision of February 16, 1948, not been later vacated by the same Court, and the cause abated, thus in effect eliminating the *Trinler* case from the docket as a precedent, it would, of course, support the view that Section 10 of the Administrative Procedure Act is applicable as a basis for review of deportation orders. The majority and dissenting opinions in that case, of course, have been studied in relation to other Court cases arising from deportation proceedings, as in the case of *Lee Tack v. Clark, et al.*³⁹ In that case Judge Clancy, on June 30, 1948, in denying plaintiff's motion for an injunction and granting defendant's motion to dismiss the complaint, said, in the part here pertinent:

"The Plaintiff assumes to proceed under the Administrative Procedure Act, 5 U.S.C.A. 1001, et seq. Despite the split decision in *Trinler v. Carusi*,

³⁹U.S. District Court, Southern District, New York, Civ. 46-279.

166 Fed. (2d) 157, we still do not believe that that statute applied to deportation proceedings. *The reasons given in the dissenting opinion are sufficient to support our judgment.*" (Italics added.)

However, Judge Clancy's opinion in the foregoing case was contra to that of Judge Ryan of the same District, in the case of *Cammarata v. Miller*, decided earlier on April 20, 1948,⁴⁰ which concluded that the Administrative Procedure Act created a new remedy described as a bill of review, to question determinations in deportation proceedings. The *Cammarata* case did not form the basis for appeal because administrative action precluded the necessity of a formal order from which appeal could be taken.

In the cases of *Azzollini v. Watkins* and *Abbatista v. Watkins*, in the United States District Court for the Southern District of New York, 81 F. Supp. 127, the Court stated:

"Petitioners ask that proceedings instituted for their deportation, and which have resulted in orders for deportation, be reviewed by this Court under Section 10 of the Administrative Procedure Act (5 U.S.C. 1009) and that pending such review proceedings be stayed. In my opinion the Administrative Procedure Act has no application * * *."

When the *Azzollini* cases were brought to the attention of the U. S. Court of Appeals for the 2nd Circuit (172 F. (2d) 897), Frank, Circuit Judge, in his opinion, stated:

⁴⁰U.S. District Court, Southern District, New York, Civ. 45-287.

“Until the enactment of the Administrative Procedure Act of 1946, it was clear that habeas corpus was the only procedure by which deportation proceedings could be reviewed. *Imperiale v. Perkins*, 66 F. (2d) 805 (App. D.C.); *Kabadian v. Doak*, 65 F. (2d) 202 (App. D.C.); *Sibray v. United States*, 158 F. 401 (C.C.A.-3rd). Petitioner contends that Sec. 10 of the Administrative Procedure Act, 5 U.S.C. Sec. 1009, authorizes review by means of this petition to review, even though he is not now in custody. The Court of Appeals for the 3rd Circuit so held in *Trinler v. Carusi*, 166 F. (2d) 457. But we need not decide this question, for, even if this form of review is permissible, the petition is without merit.”

The claim that the Administrative Procedure Act applied to immigration proceedings was urged in the District Court of the United States for the Northern District of California in the case of *Wong So Wan and Wong Tuey Wan on Habeas Corpus*, No. 28214-G, 82 F. Supp. 60, before Judge Goodman in this District. On October 29, 1948, Judge Goodman stated:

“It is claimed that the Administrative Procedure Act of June 11, 1946 (5 U.S.C. 1001 et seq.) applied to Immigration Procedures. I am convinced that it does not (5 U.S.C. 1006 (2); *U. S. v. Watkins*, 73 Fed. Supp. 216; *Obum v. Watkins*, S.D., N.Y., decided June 6, 1948, not yet reported; *Wong Yang Sung v. Clark*, D.C., D.C., decided July 28, 1948, not yet reported). Certainly it does not apply to preliminary examinations. (8 U.S.C. 152; *Ngim Ah Oy v. Haff*, 9 Cir. 112 Fed. (2d) 607.”

Appellee does not agree with the Circuit Court's first holding in the *Trinler* case, now abated, nor with the decision in the *Cammarata* case, and believes that the dissent in the *Trinler* case and the decision of Judge Clancey in the *Lee Tack* case present the proper legal view. This belief is supported by the later decisions of Judge Coxe and Judge Goodman cited above. Also, as was stated in *United States ex rel. Von Kleczkowski v. Watkins*,⁴¹ Congress not having previously entrusted to the Courts in the immigration law, the power to weigh the merit or demerit of those who knock at our doors for admission, or of those who are found by fair administrative proceedings to be deportable, it is believed that the power so specifically withheld was not conferred by the general language of the Administrative Procedure Act.

Upon the foregoing it is believed that the express language of 8 U.S.C. 155(a) that in deportation cases "the decision of the Attorney General shall be final" and that aliens of prescribed classes "shall, upon the warrant of the Attorney General be taken into custody and deported" remains the explicit and emphatic directive of Congress, and in the absence of express language in the Administrative Procedure Act modifying that authority, any limitation thereof by judicial interpretation of 5 U.S.C. 1009, a statute of general application, would seem to make that section operate as an implied repealer of the express provisions of 8 U.S.C. 155 (a). And repeal by implication may not

⁴¹71 F. Supp. 429 (S.D., N.Y., 1947).

be inferred in the absence of compelling evidence that Congress so intended.⁴²

Finally, there is nothing in the Administrative Procedure Act nor the legislative history thereof that would indicate a definite intention of Congress to repeal the express provisions of 8 U.S.C. 155(a) or provide any new judicial review remedy for deportation proceedings, and to the contrary the background of that Act indicates that Congress was thinking of legislation directed generally toward administrative actions in these agencies of Government concerned with determining rights of parties other than aliens whose admission to the United States, or exclusion or expulsion therefrom, involve an exercise of sovereignty and are inherently international and political in nature.

In this connection the Court's attention is called to the references to the "foreign affairs functions" of the Federal Government contained in Section 4 of the Act (5 U.S.C.A. 1003) as follows:

"* * * except * * * naval or foreign affairs functions of the United States * * *"

and Section 5 (5 U.S.C.A. 1004 as follows:

"* * * except * * * 'foreign affairs functions' * * *"

As was the view of the Attorney General in his statement regarding 5 U.S.C. 1009 (set forth at pages

⁴²*U.S. Alkali Ass'n v. United States*, 325 U.S. 196, 209; *United States v. Borden Corp.*, 308 U.S. 188, 198; *United States v. Jackson*, 302 U.S. 628, 631; *General Motors Corp. v. United States*, 286 U.S. 49, 61-62.

20-21 hereof) that section does not make any real change in existing law, but in general declares the existing law concerning judicial review; it is an attempt by Congress to place into statutory language existing methods of review; and in the absence of any special statutory review proceedings, other forms of action, as heretofore found by the Courts to be appropriate in particular situations, will be used. Thus, habeas corpus proceedings should be used to obtain review of exclusion and deportation orders.⁴³

II. THE REQUIREMENTS OF SECTIONS 1004, 1006, 1007 AND 1010 OF THE ADMINISTRATIVE PROCEDURE ACT ARE NOT APPLICABLE TO DEPORTATION PROCEEDINGS.

Summary.

(a) Deportation proceedings involve "adjudication" within the meaning of Section 2(d) of the Administrative Procedure Act (5 U.S.C. 1001 (d)).

Sections 7 and 8 of that Act (5 U.S.C. 1006-7) by their terms apply only to cases of "adjudication" which are governed by Section 5 (5 U.S.C. 1004).

And Section 5 applies only to cases

required by statute to be determined on the record after opportunity for an agency hearing, etc. (Italics added.)

The legislative history of the Administrative Procedure Act makes clear that the word "statute" was

⁴³*Vajtauer v. Commissioner of Immigration*, 273 U.S. 103 (1927). (See Attorney General's Manual on the Administrative Procedure Act, p. 97.)

used deliberately so as to make Section 5 (and accordingly Sections 7 and 8) applicable only where Congress by some other statute has specifically required a hearing to be held.⁴⁴

In cases where a hearing is held, although not required by statute, but as a matter of due process or agency policy or practice, Sections 5, 7, and 8 do not apply.⁴⁵ Inasmuch as 8 U.S.C. 155 does not require agency hearings, proceedings under that statute are not subject to Sections 5, 7, and 8 of the Administrative Procedure Act.

Section 11 of the Administrative Procedure Act (5 U.S.C. 1010) provides for appointment of qualified and competent examiners as may be necessary *for proceedings pursuant to Sections 7 and 8* of the same Act; hence Sections 7 and 8 are not applicable to deportation proceedings, Section 11 is likewise not applicable.

(b) Assuming, without conceding, that Sections 5, 7, 8 and 11 of the Administrative Procedure Act are applicable, then deportation proceedings conducted by immigration inspectors are within the exception to Section 7(a) of the Administrative Procedure Act (5 U.S.C. 1006) which reads:

⁴⁴Senate Hearings on Administrative Procedure before the Senate Judiciary Committee, 77th Cong., 1st Sess. (1941), pp. 453, 577; Senate Comparative Committee Print of June 1945, p. 7 (Sen. Doc. No. 248, p. 22); House Hearings (1945), p. 33 (Sen. Doc. No. 248, p. 79; Sen. Rep. No. 752, p. 40; Sen. Doc. 248, p. 226); Cong. Rec., May 24, 1946, p. 5756 (Sen. Doc. No. 248, p. 359).

⁴⁵Senate Hearings *ibid.*, p. 1456.

“* * * nothing in this Act shall be deemed to supersede the conduct of special classes of proceedings in whole or in part by or before boards of other officers specially provided for by or designated pursuant to statute.”

* * * * *

(a) **Deportation proceedings are not governed by Section 5 of the Act.**

Argument.

At the outset, it should be observed that the hearing examiners referred to in Section 11 of the Act are not required in *all* agency hearings, but only in “proceedings pursuant to Sections 7 and 8.” Sections 7 and 8, by their terms, govern only hearings required by Sections 4 or 5 of the Act. Section 4 concerns rule making, which is not here involved.

It should be noted, however, that Section 4(1) (5 U.S.C. 1003) excepts from the provisions of that section

“* * * in foreign affairs functions of the United States * * *.”

It is noted that this provision excepting “foreign affairs” also appears in Section 5, Sub-section 4, (5 U.S.C. 1004) excepting from the provisions of that section proceedings involving

“the conduct of * * * foreign affairs functions”.

Section 5 applies to adjudications, and a deportation proceeding involves adjudication within the meaning of Section 2(d) of the Act.

However, Section 5 does not require a hearing pursuant to Sections 7 and 8 in *every* case of adjudication, but rather,

“In every case of adjudication *required by statute* to be determined on the record after opportunity for an agency hearing * * *” (Emphasis supplied.)

An analysis of the legislative history of the Act reveals that Section 5 (and consequently Sections 7, 8 and 11) apply only where the substantive statute governing the agency action specifically requires a hearing.

The hearing accorded an alien in a deportation proceeding is *not* required by the substantive immigration statute. The statute (8 U.S.C. 155, 156) after defining the deportation classes of aliens, provides that upon the warrant of the Attorney General, aliens within those classes “shall be taken into custody and deported.” The immigration statute nowhere requires the Attorney General’s adjudication “to be determined on the record after opportunity for an agency hearing.”

While a hearing of some character is necessary to the validity of a deportation order, this requirement is one which has been evolved by judicial decision, applying customary concepts of due process.⁴⁶ Thus, the hearing accorded an alien in a deportation case is

⁴⁶*Vajtauer v. Commissioner*, 273 U.S. 103, 106; *The Japanese Immigrant Case*, 189 U.S. 65, 100-101; *Fong Yue Ting v. United States*, 149 U.S. 698.

one "required by law" rather than one "required by statute."⁴⁷

That the distinction between hearings required by law and hearings required by statute is significant, is manifested by the legislative history of the Administrative Procedure Act. For many years prior to its enactment, the whole field of administrative procedure had been analyzed and explored by numerous authorities. The Act derives largely from two bills introduced in the 77th Cong., 1st Sess. (1941), S. 674 and S. 675, which embodied the views of the minority and majority members, respectively, of the Attorney General's Committee on Administrative Procedure. Section 301 of both bills provided that its formal procedural provisions should apply to cases where opportunity for hearing was "required by law." (Emphasis supplied.) In 1941, extensive hearings were held on S. 674 and other bills by a Senate Judiciary Subcommittee. During these hearings it was suggested that the phrase "required by law" was ambiguous in its reach, and that there be substituted the term "statute or *constitution*." Thus, Interstate Commerce Commissioner Aitchison stated (Senate Hearings on S. 674, etc. 77th Cong., 1st Sess. (1941) (453-454):

⁴⁷See *Ludecke v. Watkins*, District Director of Immigration, 335 U.S. 160, involving the Alien Enemy Act, wherein the Supreme Court pointed out that the fact that hearings are utilized by the Executive to secure an informed basis for the exercise of the summary power conferred by the Act does not empower the Courts to retry such hearings, nor does it make the withholding of such power from the Courts a denial of due process. (pp. 171-172.)

* * * Further, the bill speaks of a hearing “required by law.” *Does this, in a case where the statute is silent, require the agency to determine whether the Constitution implies a right to be heard?* (Emphasis supplied.)

More specifically, the Commissioner of Immigration (Schofield, Special Assistant to the Attorney General in charge of the Immigration and Naturalization Service) testified (*ibid.*, p. 577):

Now, when we come to section 301. We think there ought to be some clarification of the first part of that section. As it now reads it provides that the section—that the act—the section of this title, as a matter of fact, “shall be applicable to proceedings wherein rights, duties or other legal regulations are required by law to be determined after opportunity for hearing.”

We think that that ought to be made more specific and that it ought to read something like this: That they shall apply “only to proceedings wherein rights, duties or other legal relations are required by the *constitution or statutes* to be determined after opportunity for formal hearing, and if such a hearing be held, only upon the basis of a record made in the course of such hearing.”

In other words, so that it would be clear that this statute would apply only to those matters of administrative function in our service, which are disposed of by formal hearing. This would mean exclusion cases and deportation cases (emphasis supplied).

Similarly, Solicitor General Biddle suggested that “statute *or* constitution” be substituted for “law”. He pointed out (*ibid.*, p. 1456) that:

In some cases certain agencies have *ex gratia* by regulations imposed upon themselves requirements of formal procedures though the applicable statute makes no such requirement. In order to exclude the possibility that such procedures come within title III, the amendment is desirable.

With the outbreak of war, consideration of administrative procedure was deferred until 1945. In that year, a number of bills were introduced in Congress on the subject, among others, S. 7, which, as revised, was ultimately enacted as the Administrative Procedure Act. Section 5 of S. 7 and of the statute as enacted, expressly limited the adjudicatory provision to "hearings required *by statute*."

The phrase, "statute or constitution" was thus rejected, and the narrow term "by statute" substituted for the deliberate purpose of confining the application of Section 5 to cases in which Congress itself had specifically required a hearing. The report of the Senate Committee on the Judiciary contains an analysis of the bill by the Attorney General, who stated, without contradiction, that the reference to hearings "required by statute" results in limiting Section 5 (and, therefore, Sections 7, 8 and 11) to "*cases in which the Congress has specifically required a certain type of hearing*" (emphasis supplied; Sen. Doc. 248, 79th Cong., 2d Sess., p. 226).⁴⁸ Similarly in 1945, Mr.

⁴⁸Not only is the Attorney General's interpretation under these circumstances "an indication of the Committee's opinion on the intended effect of the Act", *American Stevedores v. Porello*, 330 U.S. 446, 452, but representatives of the Department of Justice had worked closely with the Judiciary Committee on the legislation. (Sen. Doc. 248, 79th Cong., 2d Sess., p. 191; *id.*, pp. 248-249.)

McFarland, one of the minority members of the Attorney General's committee and chairman of the American Bar Association's special committee on administrative law, testified before the House Committee on the Judiciary as follows:

But none of the measures, I think with one exception, provides that the procedure in respect to adjudication shall apply to any case *unless Congress has specifically by some other statute, required an administrative hearing.* (Sen. Doc. 248, 79th Cong. 2d Session, p. 79.) (Emphasis supplied.)

In brief, both the private sponsors of the bill and the Attorney General were agreed that Sections 5, 7, 8 and 11 were to apply only to cases in which Congress had specifically required a hearing.

The statements of the congressional committee are to the same effect. Thus, the comment on the Senate Judiciary Print, June, 1945, states (Sen. Doc. 248, 79th Cong. 2d. Sess. p. 21):

* * * The introductory clause removed from the operation of sections 5, 7, and 8 all administrative procedures in which Congress has not required orders to be made upon a hearing, * * *

Again, with respect to Section 7, it is stated that "the provisions of section 7 respecting hearings are not designed to require hearings where Congress has not already done so by statute". (Sen. Doc., 248, 79th Cong. 2d Sess. p. 28.) To the same effect, see Sen. Doc. 248 *supra*, pp. 202, 260: 92 Cong. Rec. 2151-2152, 2155, 5649, 5651.

The distinction between a statutory requirement and one founded on the Constitution, it may be observed, is not merely a technical one. In limiting procedural requirements of the Act to cases of hearings required by statute, the Congress reserved to itself the right to choose the agencies to which the Administrative Procedure Act should apply. Under the construction advanced by the Government, the Act applies only to those agencies in which the Congress itself has determined that a formal hearing should be granted. Under the view taken by some plaintiffs in litigation, the reach of the Act depends, not on the will of Congress, but on the requirements of the Constitution as it may be construed from time to time by the Courts. The Constitution, however, provides no guide for determining whether the policy of the Administrative Procedure Act is applicable. The Act, in the main, and particularly as regards special examiners, goes far beyond constitutional requirements. Whether administrative discretion should be limited to any greater degree than the Constitution requires is clearly a matter of congressional policy. The Congress may well conclude that hearings should be granted in certain proceedings even though none is required by the Constitution. It may also conclude that in the interest of the national security or for other reasons of policy, the enforcement of other congressional enactments should not be limited beyond the strict requirements of the Constitution. As no constitutional right is involved, the choice is one for Congress to make.

In view of the foregoing, it can hardly be denied that the difference between "hearings required by statute" and "hearings required by law" was understood to be material by Congress. The deliberate change of the wording of the Statute from "hearing required by law" to "hearings required by statute" cannot have been without purpose. If Congress had not intended to limit the application of Sections 5, 7, 8, and 11 to proceedings where it otherwise provided therefor, by specific statute, it could have omitted from Section 5 the words "required by statute to be determined on the record after opportunity for an agency hearing." This would have left Section 5 applicable "to every case of adjudication." It should not be presumed that the language actually used is surplusage.

As already pointed out, the deportation statute does not in terms require a hearing. While elaborate provision for deportation hearings have been set up by administrative regulations,⁴⁹ such hearings have evolved out of well-defined concepts of due process rather than as a result of statutory mandate. In this connection the following excerpt from an article on the Administrative Procedure Act by Robert W. Ginnane, appearing in the University of Pennsylvania Law Review, May, 1947, Vol. 95, pp. 621 ff., at p. 635, states:

"It should be noted that Sections 5, 7, and 8 apply only where a statute requires determinations (a) on the record and (b) *after opportunity*

⁴⁹Title 8, Code of Federal Regulations, Part 150.

for an agency hearing. It appears that the 'opportunity for an agency hearing' must be required by a statute—and that a due process requirement of a hearing will not bring a proceeding within Section 5." (Emphasis by the author.)

While the cases are legion which held that an alien in a deportation proceeding must be given a fair hearing most of them do not state the basis for this conclusion.⁵⁰

However, an analysis of the cases which do mention the source of the fair hearing requirement indicates fairly clearly that the requirement is based on the due process clause of the Constitution, rather than upon the deportation statute itself. Thus, for example, in *Vajtauer v. United States*⁵¹ the United States Supreme Court stated:

"Deportation without a fair hearing on charges not supported by evidence constitute the *denial of due process* which may be prevented by habeas corpus." (Emphasis supplied.)

The identical terminology is used in *Bufalino v. Irvine*.⁵² Similarly, it was stated in *In re Chan Foo Lin*.⁵³

⁵⁰See, for example, *Kessler v. Strecker*, 307 U.S. 22, 34 (1939); *Kielemat v. Grossman*, 103 F. (2d) 292 (C.C.A. 5, 1939); *Harris v. Biskowicz*, 100 F. (2d) 854 (C.C.A. 8, 1939), *Hays v. Hatges*, 94 F. (2d) 67 (C.C.A. 8, 1939); *Hays v. Zchariados*, 90 F. (2d) 3 (C.C.A. 8, 1937); *Morrell v. Baker*, 270 F. 577 (C.C.A. 2, 1920); *Whitefield v. Hanges*, 222 F. 754 (C.C.A. 8, 1915); *Ex parte Kurth*, 28 F. Supp. 259 (D.C., Cal., 1939).

⁵¹273 U.S. 103, 106.

⁵²103 F. (2d) 830 (C.C.A. 10, 1939).

⁵³243 F. 137, 142 (C.C.A. 6, 1917).

“*The guaranty of due process forbids the deportation of a respondent without giving him a full and fair hearing.*” (Emphasis supplied.)

Also, the following language in the *Japanese Immigrant Case*,⁵⁴ indicates that the hearing requirement flows from the due process clause:

“But this Court has never held, nor must we now be understood as holding that administrative officers when executing the provisions of a statute involving the liberty of persons, may disregard the principles that inhere in ‘due process of law’ as understood at the time of the adoption of the Constitution.”

Court decisions.

The question of the applicability of Section 5 of the Administrative Procedure Act to deportation has been considered in a number of recent cases. One of the earliest cases was that of *Eisler v. Clark*,⁵⁵ in which Judge Goldsborough held that a hearing is implicit in the deportation statute since the Courts have read due process into the statute and due process means a hearing.

In *Fajaro v. United States, et al.*,⁵⁶ Judge Coxe held on June 24, 1948, to the contrary effect. Although Judge Coxe wrote no formal opinion, his decision is clearly stated in his Findings of Fact and Conclusions of Law, particularly the following Conclusions of Law numbered 7 and 8:

⁵⁴189 U.S. 86, 100.

⁵⁵77 F. Supp. 610 (D.C. Dist. Col., May 4, 1948).

⁵⁶Southern District of New York, Civil 46-214 (not reported).

7. This Court further concludes that the hearings accorded to plaintiff by the Immigration Service were hearings not required by any statute, but hearings accorded under the due process provisions of the Constitution.

8. This Court further concludes that the provisions of the said Title 5, U.S.C. Section 1004(c) relates only to hearings "required by statute."

The matter of the applicability of the Administrative Procedure Act through deportation proceedings was considered by District Judge Clancy in *Lee Tack v. Clark*, U.S.D.C. S.D. N.Y. Civ. 46-279 (unreported) in which the Court stated on June 30, 1948:

"The plaintiff assumes to proceed under the Administrative Procedure Act, 5 U.S.C.A. 1001, et seq. Despite the split decision in *Trinler v. Carusi*, 166 F. (2d) 157, we still do not believe that that statute applies to deportation proceedings. The reasons given in the dissenting opinion are sufficient to support our judgment."

The question of the applicability of the Administrative Procedure Act to deportation proceedings was asserted in the case of

Pantelis Yiakoumis, et al. v. Hall, et al., (U.S. D.C. Eastern Dist. of Virginia, Nos. 112, 113, 114 and 115),

in which the Court stated:

"The serious point in the Bogiatzis case is the averment that the Administrative Procedure Act, 5 U.S.C.A. 1001 et seq. governs the conduct of deportation proceedings by the Attorney General

under the Immigration Act of 1917, as amended. 8 U.S.C.A. 155. The point was not made in the petition but was asserted for the first time at the hearing before the Court. Admittedly, the proceedings resulting in the warrant of deportation of Bogiatzis did not comply with the process of adjudication outlined by the Administrative Procedure Act.

“After a consideration of its purpose and scope, the Court is of the opinion that the Administrative Procedure Act does not control deportation proceedings by the Attorney General. This is so because the Administrative Procedure Act both expressly and impliedly excludes matters of this nature from its application.

“When the ‘foreign affairs functions’ of the United States are involved in any legislation (rule making) or adjudication by an administrative agency the Act is inapplicable. Sections 4, 5; 5 U.S.C.A. 1003, 1004. Undoubtedly immigration, dealing with the admission and expulsion of aliens, is an exercise of a sovereign power in international relations. *Fong Yue Ting v. U. S.* 149 U.S. 698, 713, and discussion commencing at 705. It is a power belonging to the political branches of our Government, the executive and legislative. Historically they only have occupied this field of government. The Courts have studiously refrained from incursion into that realm. Even without the express exclusions in the Act, it is doubtful that the Courts would construe the Administrative Procedure Act as empowering them to review the decisions of an executive officer in the performance of foreign affairs functions of the government.

“That the Courts have in habeas corpus passed upon deportation proceedings does not weaken this view. In every such instance the writ has gone no further than to ascertain whether a person in custody is held under authority of law, *Nishimura Ekiu v. U. S.*, 142 U.S. 651, 660, and to determine whether or not the deportation order was reached through procedures affording due process of law. *Vajtauer v. Commissioner*, 273 U.S. 103, 106. It is a review of the constitutionality of the custody and expulsion. As we shall see, the review contemplated by the Administrative Procedure Act is not so straitened.

“Under this Act the Court in its review shall ‘hold unlawful and set aside’ an order ‘unsupported by substantial evidence’. Section 10(e), 5 U.S.C.A. 1009(e). In habeas corpus the Court in reviewing a deportation proceeding must sustain it if there is ‘any’ or ‘some’ evidence in support. *Vajtauer v. Commissioner*, *supra*, *Tisi v. Tod*, 264 U.S. 131; see Justice Douglas’ dissenting opinion *Ludecke v. Watkins*, 335 U.S. 160, 185.

“We think that this expansion in the breadth of review argues denial of applicability of the Act to deportation proceedings, rather than an intent on the part of the Act to enlarge the review in deportation. (But see *contra U. S. v. Watkins*, 73 F. Supp. 161, 219, rev. on other grounds 164 F. (2d) 216 without mention of the instant point.) Had Congress intended so extensive a participation of the judiciary in a political matter, it would have manifested that intention by a clear and direct investiture of the Courts with such additional jurisdiction, assuming it could constitutionally have done so.

“*U. S. v. Carusi*, 3 Cir., 166 F. (2d) 457, is not necessarily in conflict with our conclusion. There the Court held that when the deportation proceeding had reached a final stage, although not the ultimate step possible under the administrative proceeding, the deportee could seek a review by petition under the Administrative Procedure Act without awaiting an arrest and resort to habeas corpus. A petition was permitted by the Court under Sec. 10(b). 5 U.S.C.A. 1009(b). It may be, although it is not our problem here, that Section 10 should be construed to authorize a review of a final determination even in those administrative proceedings in which the adjudication is not governed by the Act, sections 5, 7, and 8 (5 U.S.C.A. 1004, 1006, 1007)—that deportation, one of such proceedings, can be reviewed, on petition, within the same scope allowed habeas corpus, as a case not ‘subject to the requirements of sections 7 and 8’ as mentioned in section 10(e). 5 U.S.C.A. 1004, 1006, 1007, 1009(e). However, this would not sustain the position of the petitioner here. He charges that the deportation proceeding must be conducted pursuant to sections 5, 7 and 8 of the Act, and *U. S. v. Carusi* does not hold that those sections apply to deportation proceedings. We agree with *Wong Yang Sung v. Clark*, D.C. D.C., 80 F. Supp. 235, that by Sec. 7(a) also, the Administrative Procedure Act is rendered inapplicable to deportation proceedings, the provisions being that ‘nothing in this chapter shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by, or designated pursuant to statute’. 5 U.S.C.A. 1006(a).

Clearly the Immigration Act requires the hearings in deportation proceedings, as well as other immigration matters, to be conducted by special officers, thus qualifying the procedure for exception under sec. 7(a) of the Administrative Procedure Act. A different conclusion, however, was reached by another judge of that Court in *Eisler v. Clark*, D.C. D.C. 77 F. Supp. 610.

“The Court will deny and dismiss all of the petitions, and this memorandum will be adopted as a statement of the findings of fact and conclusions of law in each of these cases. Counsel are requested to submit appropriate orders embodying the decisions here stated.”

Any view that the due process clause of the Constitution is not self-executing, and may come into play only through legislation, so as to justify a conclusion that a hearing implicit in due process would be required by the legislation itself, hence that the deportation statute requires a hearing, seems unsound for the reason that the due process clause does not depend upon any legislation before it can come into play. The Constitution contains two due process clauses: One is the Fifth Amendment (which inhibits Federal action) and one is the Fourteenth Amendment (which inhibits State action). Both clauses are similarly worded, and neither is applicable to statutory action alone. Thus, the Fifth amendment reads, “* * * nor shall any person * * * be deprived of life, liberty or property without due process of law”, and the Fourteenth Amendment reads, “* * * Nor shall any State deprive any person of life, liberty or prop-

erty without due process of law.” The thing aimed at is unconstitutional *action*, State or Federal, which deprives a person of his life, liberty or property, and not merely only such action as is based on a State or Federal statute. The rights defined by the Fifth and Fourteenth Amendments are personal rights and it is these rights which the Courts protect, whether the threatened incursion be by virtue of statutory authority or authority inherent in sovereignty.

Thus, in a recent case of *Shelley v. Kraemer*⁵⁷ the United States Supreme Court held that under the Fourteenth Amendment, the State’s injunctive power could not be used to enforce the restrictive covenant in question. It must be conceded that the State’s injunctive power stems, not from any State statute, but from the sovereign power of the State. The constitutionally guaranteed personal rights were thus protected from impairment by State action, even though the State action was not predicated on a statute.

Similarly, Federal action in deporting an alien without a fair hearing is forbidden, not by the Federal deportation statute (which makes no provision for a hearing), but by the Constitutional guarantee of due process. Thus, deportation on a ground not specified in the statute is forbidden⁵⁸ and any attempt by a Federal Officer to deport an alien without statutory authority would be prevented by the Courts on *habeas corpus*. Such judicial action would be predicated, not

⁵⁷68 S. Ct. 836.

⁵⁸*Bridges v. Wixon*, 326 U.S. 135, 149.

on the deportation statute or absence thereof, but in the due process clause of the Fifth Amendment.

- (b) **Deportation proceedings conducted by immigrant inspectors are within the exception to Section 7 (a) of the Administrative Procedure Act.**

Assuming, without conceding, that a deportation hearing is required by the immigration statute within the meaning of Section 5 of the Act, then the applicable provisions of Sections 5, 7, 8 and 11 would govern. But Section 7(a) contains a very important exception:

“* * * nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or in part by or before boards or other officers specially provided for by or designated pursuant to statute.”

The basic immigration statute, Section 16 of the Immigration Act of 1917 (8 U.S.C. 152) provides, in part:

** * * That the inspection, other than the physical and mental examination, of aliens, including those seeking admission or readmission to or the privilege of passing through or residing in the United States and the examination of aliens arrested within the United States under this Act, shall be conducted by immigrant inspectors, except as hereinafter provided in regard to boards of special inquiry. All aliens arriving at ports of the United States shall be examined by at least two immigrant inspectors at the discretion of the Attorney General and under such regulations as he may prescribe. Immigrant Inspectors are hereby authorized and empowered to board and*

*search for aliens any vessel, railroad car, or any other conveyance, or vehicle in which they believe aliens are being brought into the United States. Said inspectors shall have power to administer oaths and to take and consider evidence touching the right of any alien to enter, reenter, pass through, or reside in the United States, and, where such action may be necessary, to make a written record of such evidence. * * ** (39 Stat. 885-887.) (Italics added.)

This statute applies not only to exclusion cases, involving aliens seeking to enter the United States, but also expulsion cases, involving violation of the Immigration laws.⁵⁹

And the fact that the Immigration Inspector presiding at a hearing is not completely divorced from investigative and enforcement functions does not render the hearing unfair or disqualify him from hearing the case.⁶⁰

Immigrant inspectors are thus specifically designated by statute to conduct whatever hearings may be held in deportation matters. This authorization is confirmed and not repealed by the Administrative Procedure Act. There is nothing expressly contained in the Act which purports in terms to repeal the provisions of Section 16 of the Act of February 5,

⁵⁹*Loufakis v. United States*, 81 F. (2d) 966 (C.C.A. 3, 1936); *Graham v. United States*, 99 F. (2d) 746, 748-749 (C.C.A. 9).

⁶⁰*In re Giacobbi*, 32 F. Supp. 508, affirmed 11 F. (2d) 297; *Palmer v. Ultimo*, 69 F. (2d) 1, cert. den. 293 U.S. 570; *Reynolds v. U.S. ex rel. Dean*, 68 F. (2d) 346, cert. denied 291 U.S. 679; *U.S. ex rel. Boris v. Marshall*, 4 F. Supp. 965, appeal dismissed 67 F. (2d) 1020, certiorari dismissed 290 U.S. 709.

1917. And repeal by implication may not be inferred in the absence of compelling evidence that Congress so intended.⁶¹ There is no such evidence. On the contrary, Section 7(a) we submit, expressly preserves the authority of the immigrant inspectors to preside at deportation proceedings.

This construction of Section 7(a) accords with the general policy of the Act. The object of the Administrative Procedure Act was to regulate procedures developed by the administrative agencies in the exercise of their discretionary authority. The sponsors of the Act specifically disclaimed any intention to disturb procedures specifically prescribed by Congress itself. Senator McCarran, Chairman of the Senate Judiciary Committee in charge of the bill (S. 7) ultimately enacted as the Administrative Procedure Act, expressly so stated on the floor of the Senate in the following colloquy concerning the application of the Act to procedures of the Interstate Commerce Commission (Sen. Doc. No. 248, 79th Cong., 2d Sess. p. 307):

Mr. Reed. I confess a lack of understanding of the bill. * * * Over the years the Congress has laid down rules of procedure instructing the Interstate Commerce Commission as to how to act in certain cases in the matter of rate making, valuations, and orders. *All that is prescribed by*

⁶¹*U.S. Alkali Ass'n v. United States*, 325 U.S. 196, 209; *United States v. Borden Corp.*, 308 U.S. 188, 198; *United States v. Jackson*, 302 U.S. 628, 631; *General Motors Corp. v. United States*, 286 U.S. 49, 61-62.

statute. Is there anything in this bill that would interfere with that procedure?

Mr. Carran. *There is nothing in this bill which would interfere with such procedure.*

* * * * *

Mr. Reed. And it would not change its (Commission's) *method and rule* of doing business *when the same method and rule is founded on statutory authority?*

Mr. Carran. *That is correct.*

Mr. Reed. I thank the Senator.

Mr. Carran. Let me say to the Senator from Kansas that that has been one of the great problems we have had to work out in the long months of study which we have devoted to the bill. *We did not wish to disrupt or change anything that was statutory;* and yet we wanted to establish something which would prescribe and define the avenue by which the individual citizen could gain access to a public agency which would touch his private life, and we wish to find for him a way through the procedure. (Emphasis supplied.)

Senator McCarran, in commenting on the intended effect of the provisions for judicial review, again emphasized that the bill was in no wise intended to repeal acts of Congress. He stated (*id.*, p. 311):

Mr. McCarran. * * * But in answer to the first part of the Senator's question—namely, where a review is precluded by law—we do not interfere with the statute, anywhere in this bill. Substantive law, law enacted by statute by the Congress of the United States, granting a review or denying a review is not interfered with by this bill. *We are not setting ourselves up to abrogate acts of Congress.* (Emphasis supplied.)

As to any contention that if the exception to Section 7(a) of the Act is given the interpretation urged, then that the exception would apply alike to all administrative agencies, with the result that the hearing provisions of the Act would be rendered nugatory, it can be said that even if this were true, it should not deter the Courts from applying this Act as written by Congress. If the Act as drafted proves to be too broad in terminology, Congress can mend it. That this possibility was contemplated by Congress is shown in its discussion with respect to Section 7(a).

Should the preservation in Section 7(a) of the "conduct of specified classes or proceedings in whole or in part by or before the boards or other officers specially provided for by or designated pursuant to statute" prove to be a loophole for the avoidance of the examiner system in any real sense, corrective legislation would be necessary.⁶²

However, such fears appear to be groundless, since examination of legislation governing other administrative agencies indicates that there are numerous statutes which require agency hearings but which (unlike the deportation statute) do not specify the officer who is to conduct the proceeding. It is for such hearings that Section 7(a) indicates who shall be the presiding officer.

Thus, for example, 39 U.S.C. 232 provides that when a publication has been accorded second-class mail privileges, the same shall not be suspended or

⁶²Senate Document No. 248, 79th Congress, 2nd Session, p. 216; see also pp. 268, 325.

annulled until a hearing shall have been granted to the parties interested. The statute does not specify the officer who is to conduct the hearing. Similar examples may be found in the Packers and Stockyard Act, 7 U.S.C. 193; Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 919; Social Security Act, 42 U.S.C. 402; Federal Trade Commission Act, 15 U.S.C. 45; Federal Food, Drug and Cosmetic Act, 21 U.S.C. 344(b), 354(d) and (e); Interstate Commerce Act, 49 U.S.C. 13, 15; and Federal Alcohol Administration Act, 27 U.S.C. 204. There are doubtless others.

The purpose of the exception to Section 7(a), as revealed by the legislative history of the Act, is "to preserve special statutory types of hearing officers who contribute something more than examiners could contribute."⁶³ Immigrant Inspectors, by virtue of their experience in examining aliens, have special competence,⁶⁴ At any rate, since they have been specifically designated by the statute (8 U.S.C. 153) as the officers to conduct the examination in deportation cases, they come clearly within the exception to Section 7(a).

As to any view that the exception to Section 7(a) applies only to the "*conduct*" which appears in the exception, it should be observed that Section 7(a) is entitled "Presiding Officers", and it enumerates, in terms, the three classes of officers who shall preside

⁶³Senate Document No. 248, *supra*, p. 216.

⁶⁴Cf. *West Indian Co. v. Root*, 151 F. (2d) 493, C.C.A. 3, 1945.

at statutory hearings. The exception, logically construed, specifies those instances in which other officers shall preside. This is borne out by the legislative history of Section 7(a):

This subsection provides two mutually exclusive methods of hearings—by the agency itself (or one or more of its members) or by subordinate officers. *A third kind of hearing officer recognized in this subsection is one specially provided for or named in other statutes.*⁶⁵ (Emphasis supplied.)

Court decisions.

The precise point involved was raised and answered in *Wong Yang Sung v. Tom Clark*,⁶⁶ by Judge Holtzoff who on July 28, 1948, dismissed a writ of habeas corpus on the holding that:

Section 152 of Title 8 of the Immigration Law, which governs the authority and power of Immigration Inspectors, provides that said Inspectors shall have power to administer oaths and to take and consider evidence touching the right of any alien to enter, reenter, pass through or reside in the United States, and where such action may be necessary, make a written record of such evidence. In the light of this provision it seems to the Court that deportation proceedings are within the exception specially specified in Section 7(a) of the Administrative Procedure Act, because it is “a specific class of proceedings before officers specially provided for by, or designated pursuant to statute.”

⁶⁵Senate Document No. 248, *supra*, p. 207.

⁶⁶80 F. Supp. 235.

In the light of this, the Court feels that immigration deportation hearings may be properly conducted by Immigrant Inspectors and that the requirement as to hearing before specially appointed examiners as provided by the Administrative Procedure Act, does not apply.

Earlier, on July 6, 1948, Judge Rifkind also held in the exclusion case of *Obum v. Watkins*⁶⁷ that:

* * * Relator's second specification is that the Board of Special Inquiry was not constituted in compliance with the Administrative Procedure Act, 5 U.S.C.A. Section 1010. Assuming that to be so, such boards have a dispensation accorded to them by Section 1006 of the Act, which, so far as is pertinent, reads as follows:

“(a) ‘There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided by this chapter; but nothing in this chapter shall be deemed to supersede the conduct of specified classes of proceedings in whole or in part by or before boards or other officers specially provided for by or designated pursuant to statute.’”

Boards of special inquiry operating under the Immigration Act are “specially provided for or designated pursuant to statute” 8 U.S.C.A. 153 * * *.

And in *Lee Tack v. Clark, et al.*⁶⁸ Judge Clancy, on June 30, 1948, in denying plaintiff's motion for

⁶⁷82 F. Supp. 36.

⁶⁸U.S.D.C. S.D. N.Y. Civ. 46-279 (unreported).

an injunction and granting defendant's motion to dismiss the complaint, spoke broadly of the Administrative Procedure Act, as follows:

"The plaintiff assumes to proceed under the Administrative Procedure Act, 5 U.S.C.A. 1001, et seq. Despite the split decision in *Trinler v. Carusi*, 166 Fed. (2d) 157, we still do not believe that the statute applies to deportation proceedings. *The reasons given in the dissenting opinion are sufficient to support our judgment.*" (Italics added.)

That holding, while pertaining more specifically to Section 10 of the Administrative Procedure Act, is believed to indicate the thinking of the Court with respect to the general applicability of the Act to deportation proceedings.

In the cases of *Azzollini v. Watkins*, and *Abbatista v. Watkins*, in the United States District Court for the Southern District of New York, 81 F. Supp. 127, the Court stated:

"Petitioners ask that proceedings instituted for their deportation, and which have resulted in orders for deportation, be reviewed by this Court under Section 10 of the Administrative Procedure Act (5 U.S.C. 1009) and that pending such review proceedings be stayed. In my opinion the Administrative Procedure Act has no application. * * *"

When the *Azzollini* cases were brought to the attention of the U. S. Court of Appeals for the 2nd Circuit, 172 F. (2d) 897 Frank, Circuit Judge, in his opinion stated:

“Until the enactment of the Administrative Procedure Act of 1946, it was clear that habeas corpus was the only procedure by which deportation proceedings could be reviewed. *Imperiale v. Perkins*, 66 F. (2d) 805 (App. D.C.); *Kabadian v. Doak*, 65 F. (2d) 202 (App. D.C.); *Sibray v. United States*, 158 F. 401, (C.C.A.-3rd). Petitioner contends that Sec. 10 of the Administrative Procedure Act, 5 U.S.C. Sec. 1009, authorizes review by means of this petition to review, even though he is not now in custody. The Court of Appeals for the 3rd Circuit so held in *Trinler v. Carusi*, 166 F. (2d) 457. But we need not decide this question, for, even if this form of review is permissible, the petition is without merit.”

The claim that the Administrative Procedure Act applied to immigration proceedings was urged in the case of *Wong So Wan* and *Wong Tuey Wan* on Habeas Corpus, No. 28214-G, 82 Fed. Supp. 60 before Judge Goodman in this District. On October 29, 1948, Judge Goodman stated:

“It is claimed that the Administrative Procedure Act of June 11, 1946 (5 U.S.C. 1001 et seq.) applied to Immigration Procedures. I am convinced that it does not. (5 U.S.C. 1006(2)); *U. S. v. Watkins*, 73 Fed. Supp. 216; *Obum v. Watkins*, S.D. N.Y. decided June 6, 1948 not yet reported; *Wong Yang Sung v. Clark*, D.C. D.C. decided July 28, 1948, not yet reported. Certainly it does not apply to preliminary examinations. 8 U.S.C. 152; *Ngim Ah Oy v. Haff*, 9 Cir. 112 Fed. 2d 607”.

The District Court for the District of Columbia (Judge Holtzoff) again considered the question in

Wong Yang Sung v. Clark, 80 F. Supp. 235. That matter involved a petition for writ of habeas corpus to review an order of deportation. One of the grounds upon which the review was sought, was that the proceeding was not held and instituted in accordance with the provisions of the Administrative Procedure Act. The Court ruled that the provision of Title 5 U.S.C.A. 1006, Sub-Sec. (a) constituted an exception in favor of deportation hearing because of the provision of 8 U.S.C.A. 152 authorizing immigrant inspectors to administer oaths and to conduct and consider evidence bearing upon the right of any alien to enter, re-enter, pass through or reside in the United States, and where such action may be necessary, make and retain a record of such evidence. The Court held that deportation proceedings are "a specific class of proceeding before officers specially provided for by or designated pursuant to statute," and that the requirements as to hearing before specially appointed examiners as provided by the Administrative Procedure Act does not apply. On Appeal to the United States Court of Appeals for the Second Circuit (District of Columbia) this same case was decided on April 4, 1949 in the following language:

"Per curiam: The judgment of the District Court is affirmed on the opinion of Judge Holtzoff. *Wong Wan Sung v. Clark*, 80 F. Supp. 235."

It is immaterial that appellant entered the United States legally. *Azzollini, et al. v. Watkins*, (C.C.A. 2nd, decided March 10, 1949).

The District Court for the District of Columbia, Judge Pine, again considered this question in the

case of *Chow Kau v. Clark*, Civ. No. 5040-48 (not yet reported). This case involved a native citizen of China, who was arrested and granted a deportation hearing, following which a warrant of deportation was issued. The plaintiff contended that the warrant of deportation was invalid because hearings had not been held in compliance with the Administrative Procedure Act. In the Court's opinion, dated April 27, 1949, it was stated:

"In *Sung v. Clark, et al.* (80 Fed. Supp. 235) District Judge Holtzoff referred to subsection (a) of Section 7 of this Act, providing that 'nothing in this chapter shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute,' and held that 'deportation proceedings are within the exception contained in Section 7(a) of the Administrative Procedure Act.' The United States Court of Appeals for the District of Columbia affirmed on Judge Holtzoff's opinion (*Sung v. Clark, et al.*, No. 10009, April 4, 1949). This would appear to be dispositive in this jurisdiction of plaintiff's Administrative Procedure Act or the Declaratory Judgment Act.

"This motion to dismiss is therefore granted. Counsel will submit appropriate order."

In the case of

Alfredo Dante Perfumo v. Shaughnessy, U.S. D.C. N.Y. Civ. 49-569, Apr. 27, 1949 (not yet reported),

the Court had for consideration an action to enjoin the District Director from deporting plaintiff under

an order and warrant of deportation. The Court (J. Kaufman) declined to comment as to whether Section 10 of the Administrative Procedure Act (5 U.S.C.A. 1009) permitted judicial review of deportation proceedings through an action seeking injunctive relief since all the objections raised against plaintiff's deportation were without merit. In its opinion, the Court stated:

“Plaintiff argues that the deportation hearings were not conducted in accordance with the provisions of the Administrative Procedure Act. There is no substance to that contention. Those sections of the Administrative Procedure Act which are claimed to have been violated do not apply, by force of the statute itself, to deportation proceedings. Administrative Procedure Act, Sec. 7(a), 5 U.S.C.A. Sec. 1006(a); *Azzollini v. Watkins*, (C.A. 2, March 10, 1949); *United States ex rel. Johnson v. Watkins*, 170 F. (2d) 1009, 1013. The claim that the immigration department has been discriminatory is unfounded since the alien entered as a stowaway and is clearly deportable under the immigration laws. 8 U.S.C.A. Sec. 136(1); *Pisano v. Tillinghast*, 1 Circ. 40 F. 2d 51; *York v. Nicolls*, 66 F. Supp. 747.

“Motion to dismiss complaint is granted.”

4. THAT I. F. WIXON INDIVIDUALLY AND AS DISTRICT DIRECTOR OF THE UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, DEPARTMENT OF JUSTICE, IS NOT A PROPER DEFENDANT, EITHER INDIVIDUALLY OR OFFICIALLY. IT FOLLOWS BY COROLLARY THAT ARTHUR J. PHELAN, ACTING DISTRICT DIRECTOR OF THE UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, DEPARTMENT OF JUSTICE, WOULD ALSO NOT BE A PROPER DEFENDANT INDIVIDUALLY OR OFFICIALLY.
5. THAT THE COMPLAINT IN THIS ACTION STATES NO CAUSE OF ACTION, AS TO I. F. WIXON, INDIVIDUALLY OR OFFICIALLY, AND SINCE THE NAME OF ARTHUR J. PHELAN HAS BEEN SUBSTITUTED FOR THAT OF I. F. WIXON, IT STATES NO CAUSE OF ACTION AS TO ARTHUR J. PHELAN, INDIVIDUALLY OR OFFICIALLY.

At all times mentioned in appellants' complaint, filed in the United States District Court, I. F. Wixon was District Director of District No. 13, Immigration and Naturalization Service, Department of Justice. On May 1, 1949, Arthur J. Phelan became Acting District Director of the same District, and is presently occupying said position.

While serving as District Director of the 13th Immigration District, and as such District Director, the said I. F. Wixon, pursuant to instructions from his superiors, the Commissioner of Immigration at Washington, D. C., and the Attorney General, Department of Justice, Washington, D. C., directed that hearings be held to determine whether the appellants herein are subject to deportation upon charges contained in warrants of arrest heretofore served upon each and every appellant. It is stipulated to by appellee herein that in each and every case one of the issues to be determined is whether the appellants individually are or have been members of an organization that believes

in, advises, advocates or teaches the overthrow by force or violence of the Government of the United States * * *, or are otherwise subject to deportation under other provisions of the Act of October 16, 1918, as amended (8 U.S.C. 137). It is to prevent the holding of these hearings that appellants seek injunctive relief.

As District Director of the Thirteenth District of the Immigration and Naturalization Service, the appellee acted only as an agent or employee of the Attorney General of the United States, and his duties are prescribed by regulations promulgated by the Attorney General.

8 C.F.R. 60.2 sets forth the powers and duties to be performed by the District Directors of the United States Immigration and Naturalization Service under the direction of the Attorney General of the United States, by and through the Commissioner of Immigration and Naturalization.

8 C.F.R. 60.2 reads as follows:

*“Under the general direction of the Commissioner, and subject to the provisions of this chapter, a District Director shall supervise and direct within his district the administration and enforcement of immigration, nationality and all other laws determined by this Service * * *.”*
(Emphasis supplied.)

The hearings of each and every one of these appellants were set by him pursuant to the regulations of the Attorney General promulgated by and through the Commissioner of Immigration and Naturalization as follows:

8 C.F.R. 150.6 (a)

“After an alien has been taken into custody under a warrant of arrest * * * the alien shall be granted a hearing to determine whether he is subject to deportation on the charges stated in the warrant of arrest * * *.

(b) “The Immigrant Inspector assigned to conduct a hearing under a warrant of arrest shall be referred to as the ‘presiding inspector’. The Immigrant Inspector who conducted the investigation in a case shall not act as presiding inspector unless the alien consents thereto. The presiding inspector shall rule upon all objections to the introduction of evidence or motions made during the course of the hearing, * * *.”

The procedure for these hearings is fully set forth in Regulations 8 C.F.R. 150.6 and 150.7.

There are in the regulations no other provisions for the conduct of deportation hearings in any other manner.

In *Generich v. Rutter*, 265 U.S. 388, 68 L. Ed. 1068, 44 S. Ct. 532, plaintiff sought to compel the performance of an act by a subordinate over which officially he had no control. In its decision the Court said:

“The act and the regulations make it plain that the prohibition commissioner and the prohibition director are mere agents and subordinates of the Commissioner of Internal Revenue. They act under his direction and perform such acts only as he commits to them by the regulations. They are responsible to him and must abide by his direction. What they do is as if done by him. He is the public’s real representative in the matter, and if the injunction were granted, his

are the hands which would be tied. All this being so, he should have been made a party defendant—the principal one—and given an opportunity to defend his direction and regulations.”

In this case, the direction and regulations are those of the Attorney General of the United States.

Webster v. Fall, 266 U.S. 507, 69 L. Ed. 411, 45 S. Ct. 148;

Warner Valley Stock Co. v. Smith, 165 U.S. 34; 41 L. Ed. 621, 17 S. Ct. 225.

Also unreported case of

Toshiyo v. Ozaki v. John D. Nagle, Equity No. 3418 decided January 18, 1933.

The appellee is not a proper party defendant for the reason that appellants seek to enjoin him from the performance of an official and administrative act over which he has no control or authority.

The Court below relied upon the case of *Williams v. Fanning*, 332 U.S. 490, L. Ed. 161, Dec. 8, 1947, as authority for the point that the Attorney General of the United States is not an indispensable party to this proceeding. (Tr. p. 20.) It will be noted, however, that where action is necessary on the part of a superior officer, such officer is an indispensable party if the decree granting the relief sought will require him to take action either by exercising directly a power lodged in him or by having a subordinate exercise it for him. In the instant case it would be necessary, if in fact the provisions of the Act are applicable, for the Attorney General of the United States to take action to put into effect the necessary regu-

lations to provide for the execution of the provisions of the Administrative Procedure Act (*supra.*). On page 492 of the opinion of the Court in the *Fanning* case (*supra.*) the Court stated:

“It was long assumed that the Postmaster General was not an indispensable party in these fraud order cases. Beginning at least with *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, decided in 1902, the maintenance of the suit against the local postmaster alone was not challenged.

“Meanwhile, another line of cases was emerging. *Warner Valley Stock Co. v. Smith*, 165 U.S. 28, held that a suit against the Secretary of the Interior to compel him to issue patents to public lands abated on his resignation. As the purpose of the bill was ‘to control the action of the Secretary of the Interior’ (165 U.S. p. 34), he was held to be an indispensable party. Next came *Gnerich v. Rutter*, 265 U.S. 388, which was a suit to enjoin a representative of the Commissioner of Internal Revenue from enforcing a restriction embodied in a permit issued under the National Prohibition Act. The subordinate official, acting for the Commissioner, had refused to give plaintiffs the more liberal permit which they desired; and he had no power to grant the desired permit without revision of his delegated authority. The Commissioner was held to be an indispensable party. *Webster v. Fall*, 266 U.S. 507, followed. That was a suit brought by an Osage Indian to require payment to him of funds under an act of Congress. The power and responsibility of making the payments being in the Secretary of the Interior, he was held to be an indispensable party.

“These cases evolved the principle that the superior officer is an indispensable party if the decree granting the relief sought will require him to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him.”

In view of the present regulations of the Attorney General governing hearings in deportation proceedings (8 U.S.C. 150, *supra.*), it is clear that a restraining order upon I. F. Wixon (now Arthur J. Phelan) would directly require him to act contrary to the regulations of the Attorney General. A decree granting the relief sought would therefore require the Attorney General to take action. The *Fanning* opinion further states:

“That principle was brought into clearer relief by *Colorado v. Toll*, 268 U.S. 228. There the director of national parks had issued regulations forbidding operation in the Rocky Mountain National Park of automobiles for hire. Toll was the superintendent of the park who was enforcing the regulation. A suit to enjoin him was allowed to be maintained without joining his superior, the director, who had promulgated the regulation. That result followed, 268 U.S. p. 230, by analogy to those cases which permit suit against a public official who invades a private right either by exceeding his authority or by carrying out a mandate of his superior. *United States v. Lee*, 106 U.S. 196; *Philadelphia Co. v. Stimson*, 223 U.S. 605, 619, 620. In those situations relief against the offending officer could be granted without risk that the judgment awarded would ‘expend itself on the public treasury or

domain, or interfere with the public administration.' *Land v. Dollar*, 330 U.S. 731, 738."

If the Attorney General is required by injunction to comply with the provisions of the Administrative Procedure Act he must provide for the appointment of officers to preside at the reception of evidence (5 U.S.C. 1004(c) and 1010). This would involve an expenditure from the public treasury of the United States. The decision cited concludes as follows:

"But the distinction we have noted between these two lines of cases apparently was not as clear to others as it seems to us. For a conflict among the circuits developed in these postal fraud cases. *National Conference v. Goldman*, 85 F. 2d 66, which held that the Postmaster General must be made a party, suggested that if he were not, the local postmaster would be left under a command of his superior to do what the court has forbidden. But that seems to us immaterial if the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the court. It seems plain in the present case that that will be the result even though the local postmaster alone is sued. It is he who refuses to pay money orders, who places the stamp 'fraudulent' on the mail, who returns the mail to the senders. If he desists in those acts, the matter is at an end. That is all the relief which petitioners seek. The decree in order to be effective need not require the Postmaster General to do a single thing—he need not be required to take new action either directly as in the *Smith* and *Fall* cases or indirectly through his subordinate as in the *Rutter* case. No concurrence on his part is necessary to make lawful the

payment of the money orders and the release of the mail unstamped. Yet that is all the court is asked to command. *Reversed.*”

Judge Harris in the District Court below more recently held in *Van Raeken v. United States*, No. 28807-H, decided June 3, 1949, not yet reported, a complaint for injunction against the Immigration and Naturalization Service, that the Attorney General should have been made a party defendant.

The Courts in holding that they can act on an officer within their jurisdiction have never gone so far as to hold him responsible for acts over which he has no control. It appears clearly that in the instant action the granting of the relief requested would require the Attorney General to take affirmative action and that therefore he is the proper party defendant rather than I. F. Wixon, or Arthur J. Phelan.

6. THAT APPELLANTS HAVE NOT EXHAUSTED THEIR LEGAL ADMINISTRATIVE REMEDIES.

Appellants seek to restrain administrative hearings to determine whether they are subject to deportation. The Courts have uniformly held that they will not interfere in an administrative proceeding until final action has been taken by the administrative authorities in the manner provided by the statutes.

In *Impiriale v. Perkins*, Secretary of Labor Department, decided June 30, 1933, in the Court of Appeals of the District of Columbia, 66 F. (2d) 205, Certiorari Denied 290 U.S. 690, the Court said:

“Since deportation proceedings are administrative and the action of the Secretary of Labor is intended by the statutes to be final, there is no regulatory power in the Courts to control the course of such proceedings while pending in the Department. The jurisdiction of the Courts is contingent, and usually to be exercised *ex post facto* of an order of deportation.”

While there appears to be no such specific provision in the rules of this Court, it is enlightening to note that the New York District Court rules provided as follows:

“Rule XIV (b). Writ will not be allowed unless the petition shows in exclusion cases that the alien has appealed from an order of exclusion of a Board of Special Inquiry, and that the Secretary of Labor has affirmed the exclusion and ordered the alien deported. * * *”

In *United States ex rel. Loucas v. Commissioner of Immigration*, decided in the District Court, New York on May 5, 1931, 49 F. (2d) 473, it is stated:

“That rule (Rule XIV *supra*.) embodies the normally appropriate attitude of the Federal Courts vis-a-vis the executive branch of the government * * * ordinarily it would be insupportable for the Courts thus to interfere *ad interim* with the enforcement of our laws by the appropriate executive department. Administrative redress should always be exhausted before recourse is had to the Courts.”

In *United States ex rel. Peterson et al. v. Commissioner of Immigration* (D.C. N.Y.) decided Nov. 11, 1932, 1 F. Supp. 735, the Court said:

“Furthermore, on general principles Courts should not interfere with the executive in regard to any matter until the executive has made its final decision, and then only if that decision transcends the scope of executive power by reason of illegality implicit in its nature or in the method of its exercise.” Citing *Hara v. U. S.*, D.C., 54 F. (2d) 397, 399.

See also *U. S. v. Parson*, 22 F. Supp. 149, to the same effect.

In *United States ex rel. Grau v. Uhl*, 262 Fed. 532, the Court said:

“Where, therefore, a question of fact is involved, the statutory remedies and appeals must first be exhausted before this Court will entertain an application for a writ of habeas corpus.

“As the petition shows on its face that petitioner has not taken his appeal to the Secretary of Labor, as provided by Section 17, the application is denied.”

That the Courts may not interfere on *habeas corpus* until the administrative processes of hearing before the local immigration authorities and appeal to the Commissioner have been completed, and that in the interim the immigration authorities have power to detain the applicant appears to be settled by the case of *United States v. Sing Tuck*, 194 U.S. 161, wherein the Court said:

“In *Gonzales v. Williams*, 192 U.S. 1, there was no use in delaying the issue of the writ until an appeal had been taken, because in that case there was no dispute about the facts but merely a question of law. Here the issue, if there

is one, is pure matter of fact, a claim of citizenship under circumstances and in a form naturally raising a suspicion of fraud.

“Considerations similar to those which we have suggested lead us to a further conclusion. Whatever may be the ultimate rights of a person seeking to enter the country and alleging that he is a citizen, it is within the power of Congress to provide at least for a preliminary investigation by an inspector, and for a detention of the person until he has established his citizenship in some reasonable way.”

In the case of *Lee Fong Fook v. I. F. Wixon*, C.C.A. 9, Circuit No. 11860 decided Oct. 25, 1948, 74 F. Supp. 68, 170 F. (2d) 245, Cert. den. 336 U.S. 914, the Circuit Court held that administrative remedies must be exhausted. In the last mentioned case, Lee Fong Fook was an honorably discharged veteran of World War Two and therefore there was a very strong sympathy element involved in the case. Lee Fong Fook was a Chinese who upon his return from a trip to China applied for entry into the United States as a United States citizen. He had obviously resided in the United States for a considerable period of time prior to his departure to China, from which trip he was then returning.

CONCLUSION.

For the reasons stated herein, the appellees are of the opinion that there is ample authority in law for the finding of the Court below and therefore urge that the decision of the Court below be affirmed.

Dated, San Francisco, California,

June 22, 1949.

FRANK J. HENNESSY,

United States Attorney,

EDGAR R. BONSALE,

Assistant United States Attorney,

Attorneys for Appellee.

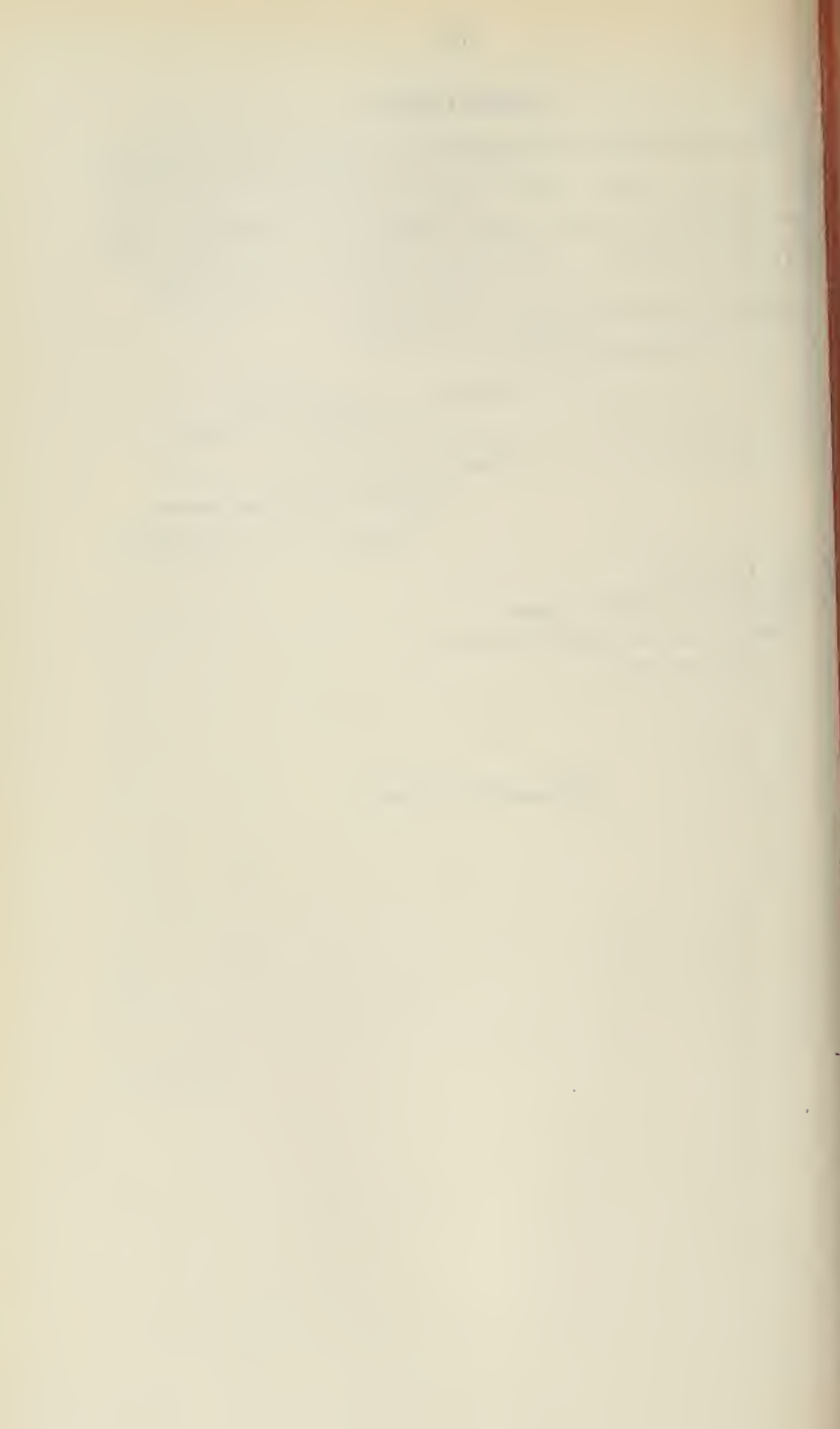
L. E. GOWEN,

Assistant Adjudications Officer,

Immigration and Naturalization Service,

On the Brief.

(Appendix Follows.)



Appendix.



Appendix

A. PERTINENT IMMIGRATION STATUTES.

Title 8 U. S. Code, Section 152.

“* * * The inspection * * * of aliens, including those seeking admission or readmission to or the privilege of passing through or residing in the United States, and the examination of aliens arrested within the United States under this section, shall be conducted by immigrant inspectors, except as hereinafter provided in regard to boards of special inquiry. * * * Said Inspectors shall have the power to administer oaths and to take and consider evidence touching the right of any alien to enter, reenter, pass through, or reside in the United States, and, where such action may be necessary, to make a written record of such evidence. * * * Any district director of immigration and naturalization designated by the Commissioner or any inspector in charge shall also have power to require by subpoena the attendance and testimony of witnesses before said inspectors and the production of books, papers, and documents touching the right of any alien to enter, reenter, reside in, or pass through the United States. * * *” (Feb. 5, 1917, ch. 29, Sec. 16, 39 Stat. 885; renumbered Aug. 13, 1946, ch. 958, Sec. 5, 60 Stat. 1049).

(N.B. A discussion of the scope of this statute is found in *Graham v. United States*, 99 F. (2d) 746.)

Title 8, U.S. Code, Section 155(a).

“At any time within five years after entry, any alien who at the time of entry was a member of one

or more of the classes excluded by law; any alien who shall have entered or who shall be found in the United States in violation of this chapter * * * shall, upon the warrant of the Attorney General, be taken into custody and deported. * * * In every case where any person is ordered deported from the United States under the provisions of this chapter, or of any law or treaty, the decision of the Attorney General shall be final.”

B. THE ADMINISTRATIVE PROCEDURE ACT.

Section 1. (This section merely designates the title of the Act as the “Administrative Procedure Act”.)

Section 2. (5 U.S.C. 1001).

Section 1001. Definitions.

As used in this chapter——

(a) Agency.

“Agency” means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories or the District of Columbia. Nothing in this chapter shall be construed to repeal delegations of authority as provided by law. Except as to the requirements of section 1002 of this title, there shall be excluded from the operation of this chapter (1) agencies composed of representatives of the par-

ties or of representatives of organizations of the parties to the disputes determined by them (2) courts martial and military commissions, (3) military or naval authority exercised in the field in time of war or in occupied territory, or (4) functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, and the functions conferred by Sections 301-303, 304, 305, 306-309, 310, 311-318, 1611-1614, 1615-1646 of Appendix to Title 50, and sections 101-125 of Title 41; and sections 1738, 1739, and 1743 of Title 12, and sections 1821-1833 of Appendix to Title 50.

(b) Person and party.

“Person” includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies. “Party” includes any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding; but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes.

Sec. 2.

(c) Rule and rule making.—“Rule” means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates,

wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

(d) Order and adjudication.—"Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.

(e) License and licensing.—"License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license.

(f) Sanction and relief.—"Sanction" includes the whole or part of any agency (1) prohibition, requirement, limitation, or other condition affecting the freedom of any person; (2) withholding of relief; (3) imposition of any form of penalty or fine; (4) destruction, taking, seizure, or withholding of property; (5) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees; (6) requirement, revocation, or suspension of a license; or (7) taking of other compulsory or restrictive action. "Relief" includes the whole or part of any

agency (1) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy; (2) recognition of any claim, right, immunity, privilege, exemption, or exception; or (3) taking of any other action upon the application or petition of, beneficial to, any person.

(g) Agency proceeding and action.—“Agency proceeding” means any agency process as defined in subsections (c), (d), and (e) of this section. “Agency action” includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act. (June 11, 1946, ch. 324, Sec. 2, 60 Stat. 217; Aug. 8, 1946, ch. 870, Title III, Sec. 302, 60 Stat. 918; Aug. 10, 1946, ch. 951, Title VI 601, 60 Stat. 993).

Amendments

1946 Subsection (a) amended by acts Aug. 10, 1946 and Aug. 8, 1946, both cited to text, both of which added at end of subsection, “Secs. 1738, 1739, and 1743 of Title 12, and Secs. 1821-1833 of Appendix to Title 50”.

Effective Date

Section as effective three months after June 11, 1946, see Sec. 1011 of this title.

Sec. 3. (5 U.S.C. 1002).

Sec. 1002. Publication of information, rules, opinions, orders and public records.

Except to the extent that there is involved (1) any function of the United States requiring secrecy in

the public interest or (2) any matter relating solely to the internal management of an agency——

(a) Rules.—Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

(b) Opinions and orders. Every agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and all rules.

(c) Public records.—Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except informa-

tion held confidential for good cause found. (June 11, 1946, ch. 324, Sec. 3, 60 Stat. 238).

Effective Date

Section as effective three months after June 11, 1946, see Sec. 1011 of this title.

Sec. 4. (5 U.S.C. 1003).

Sec. 1003. Rule making.

Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

(a) Notice; publication and contents.—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that

notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) Procedures.—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

(c) Time of publication or service of rules.—The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

(d) Rules.—Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule. (June 11, 1946, ch. 324, Sec. 4, 60 Stat. 238).

Effective Date

Section as effective three months after June 11, 1946, see Sec. 1011 of this title.

Sec. 5. (5 U.S.C. 1004).

Sec. 1004. Adjudication.

In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives——

(a) Notice of hearing and issues.—Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties of the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(b) Procedure.—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 7 and 8.

(c) Authority and functions of officers and employees.—The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor

shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

(d) Declaratory orders.—The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to determine a controversy or remove uncertainty. (June 11, 1946, ch. 324, Sec. 5, 60 Stat. 239).

Effective Date

Section as effective three months after June 11, 1946, see Sec. 1011 of this title.

Sec. 7. (5 U.S.C. 1006).

Sec. 1006. Hearings; presiding officers; powers and duties; burden of proof; evidence; record as basis for decision.

In hearing which Sec. 1003 or 1004 of this title require to be conducted pursuant to this section—

(a) There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems

himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.

(b) Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpoenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.

(c) Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary

evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(d) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary. (June 11, 1946, ch. 324, Sec. 7, 60 Stat. 241).

Effective Date

Section as effective six months after June 11, 1946, see Sec. 1011 of this title.

Sec. 8. (5 USC 1007)

Sec. 1007. Initial decisions; conclusiveness; review by agency; submission by parties; contents of decisions; record.

In cases in which a hearing is required to be conducted in conformity with Section 1006 of this title—

(a) In cases in which the agency has not presided at the reception of the evidence, the officer who pre-

sided (or, in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

(b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision or subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or

(2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof. (June 11, 1946, ch. 324, Sec. 8, 60 Stat. 242).

Effective Date

Section as effective three months after June 11, 1946, see Sec. 1011 of this title.

Sec. 10 (5 USC 1009)

Sec. 1009. Judicial review of agency action.

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) Right of review.— Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) Form and venue of action.— The form of proceeding for judicial review shall be any special

statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) Reviewable acts.— Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) Interim relief.— Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable

injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) Scope of review.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. (June 11, 1946, ch. 324, Sec. 10, 60 Stat. 243).

Effective Date

Section as effective three months after June 11, 1946, see Sec. 1011 of this title.

Section as effective August 1, 1946 with respect to judicial review of any agency action under the Atomic Energy Act of 1946. See Sec. 1914 of Title 42, The Public Health and Welfare.

Price Decontrol Board

Orders of Price Decontrol Board not subject to review or modification. See Sec. 901 a (h) (3) of Appendix to Title 50, War.

Sec. 11 (5 USC 1010)

Sec. 1010. Appointment of examiners; assignment, removal and compensation; jurisdiction of Civil Service Commission.

Subject to the civil-service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 1006 and 1007 of this title, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission (hereinafter called the Commission) after opportunity for hearing and upon the record thereof. Examiners shall receive compensation prescribed by

the Commission independently of agency recommendations or ratings and in accordance with sections 661-663, 664-669, 670-672, 673, and 674 of this title, except that the provisions of paragraphs (2) and (3) of subsection (b) of section 667 of this title, and the provisions of section 669 of this title, shall not be applicable. Agencies occasionally or temporarily insufficiently staffed may utilize examiners selected by the Commission from and with the consent of other agencies. For the purposes of this section, the Commission is authorized to make investigations, require reports by agencies, issue reports, including an annual report to the Congress, promulgate rules, appoint such advisory committees as may be deemed necessary, recommend legislation, subpoena witnesses or records, and pay witness fees as established for the United States courts. (June 11, 1946, ch. 324, Sec. 11, 60 Stat. 224).

No. 12,174

IN THE

United States Court of Appeals
For the Ninth Circuit

NAT YANISH, WILLIAM HEIKKILA, JOHN
DIAZ, HERMAN LANSBURG and FRANK
CARLSON,

Appellants,

VS.

I. F. WIXON, individually, and as Dis-
trict Director, Immigration and Natu-
ralization Service, Department of
Justice [Arthur J. Phelan, Successor,
substituted therefor],

Appellee.

APPELLANTS' REPLY BRIEF.

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FILED

JUL 26 1949

PAUL P. O'BRIEN,

CLERK

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substituted therefor],

Appellee.

APPELLANTS' REPLY BRIEF.

SUMMARY OF ARGUMENT.

- I. The Administrative Procedure Act was intended to provide judicial review of deportation cases.

The plain meaning of the Act, which employs all-inclusive and sweeping terms, indicates a Congressional intention to do more than merely codify administrative law, or to restate already existing law. And the legislative history of the Act demonstrates that the Congress was completely aware that this legislation made changes in the existing law of judicial review.

II. The procedural requirements of the Act apply to immigration hearings.

The legislative history, including the record of testimony given on behalf of the Immigration and Naturalization Service before the Senate Committee which considered the bill, demonstrate that no doubt was entertained that the procedural provisions of the bill applied to deportation and exclusion hearings. The decided cases are inapplicable.

The Congressional policy behind this Act, to separate judicial and prosecuting functions within administrative agencies applies nowhere more clearly than in deportation proceedings.

I. LEGISLATIVE HISTORY OF SECTION 10 OF THE ACT.

- A. The plain meaning and the legislative history of the Act discloses an intent on the part of Congress to provide for judicial review in cases where existing law failed to provide for it.

Appellees contend that the legislative history of the Administrative Procedure Act, 5 U.S.C.A. §1001 et seq. (hereafter referred to as the Act) shows that it was the intention of Congress merely to state existing law with respect to judicial review. Judicial review is provided for in Section 10 of the Act. The very terms used by the Congress in this section are an indication of the broad sweep of Congressional intent.

Point by point consideration of Section 10 will demonstrate, it is believed, that the plain meaning of the statute is inconsistent with appellee's theory that it is merely a restatement of existing law.

A right of review is afforded to “*any person suffering legal wrong because of any agency action * * **” Review was provided in the form prescribed by any statute or “in the absence or inadequacy thereof, *any* applicable form of legal action * * *” Review was extended to *all* actions, both civil and criminal, and in case statutory remedies already provided proved inadequate, review was provided by this Act.

Subsection (c) of Section 10 provides what acts are reviewable. In contrast with the usual rule prevailing before the passage of the Act “*every* agency action” for which there is no other adequate remedy in any Court was made subject to judicial review. Not only were final actions made reviewable, but “*any preliminary, procedural, or intermediate agency action or ruling not directly reviewable * * **” was made subject to review. Finally, meeting the rule sometimes applied, that until those affected by administrative agencies apply for reconsideration or redetermination, agency action is not reviewable because not final, the Act provides that there shall be no requirement of a demand for reconsideration unless the agency provides for this by rule and *inter alia* provides that the action meanwhile shall be inoperative.

And in subsection (d) of Section 10, the Congress met the rule that plaintiffs must exhaust their administrative remedies before seeking the aid of a Court. This subsection of the Act authorizes Courts, “upon such conditions as may be required and to the extent necessary to prevent irreparable injury * * *”

to take effective action to preserve status or rights pending conclusion of the review proceedings.

In the concluding subsection of Section 10, the Congress set forth the scope of review, and the conditions under which, and the methods by which, any wrongful agency action might be remedied. The extraordinary sweep of the power there granted to the Courts, to control the action of administrative agencies, is perhaps without precedent in American statutory law. The Court is required to decide (1) all relevant questions of law; (2) interpret constitutional and statutory provisions; (3) determine the meaning or applicability of the terms of any agency action. That having been done, the Act says that the Court shall:

(A) Compel agency action unlawfully withheld or unreasonably delayed; and

(B) Hold unlawful and set aside agency action, findings, and conclusions found to be

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) contrary to constitutional right, power, privilege, or immunity;

(3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(4) without observance of procedure required by law;

(5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of the Act or otherwise reviewed

on the record of an agency hearing provided by statute; or

(6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing Court.

And in its consideration and disposition of the case, the Court is enjoined to *review the entire record* or such portion as may be cited by any party, and to take account of the rule of prejudicial error. Here Congress clearly manifests its intention to do away with the rule that "any evidence" or "a scintilla of evidence" will support an administrative determination. This is in itself an important change in the prior law.

It is natural that a Congressional enactment passed without significant opposition and after approximately ten years of intensive study and the formation and consideration of numerous bills aimed at the same problems, should be important, new, and perhaps disturbing. The valiant attempt of administrative agencies and of some Courts to minimize the importance of what Congress here attempted and to shrink its scope to a mere restatement of already existing law is therefore understandable.

An examination of the section discussed above should be made in the light of the clamorous attacks on administrative agencies that were dinned into the ears of Congress since the days of the first Roosevelt administration. It should take into account the reaction of many conservative elements in our society to

the tremendous expansion of administrative agencies which took place in the Roosevelt administrations. Consideration of the Act in the light of administrative law as it existed prior to the enactment of this statute, must lead a dispassionate Court to the conclusion that the Congress was not here engaged in an uncalled for and useless restatement of already existing law.

It was on the contrary forging a new weapon for governmental use in coping with the complexities of modern life. That is, it was here attempting to regulate the use of administrative agencies so as to prevent the formation of a bureaucracy foreign to American traditions, yet powerful and efficient enough to cope with its tremendous tasks. No other reason can be advanced for the ten years of Congressional labor which produced this Act. The elephant did not labor to bring forth a mouse.

B. Congressional debate demonstrates legislative intention to include deportation procedures in the scope of the Act.

Whatever the Attorney General's attitude toward this Act may have been, the debate in Congress documents the broad Congressional intent which has just been discussed.

Appellee argues that deportation proceedings fall within the exception stated in Section 10 of the Act, excluding from judicial review cases in which "statutes preclude judicial review." That the House understood that judicial review was given in every instance where not expressly excluded is demonstrated by the following excerpt from the House debate. Rep. Doliver, in discussing the bill, remarked:

“* * *Not only does it promote uniformity but it codifies the procedures in a court review. This part of the bill has just been explained by my colleague the gentleman from Indiana [Mr. Springer]. Because of the necessity of passing the bill, how great have been the abuses in some of the agencies concerned. [sic.]

Personally, I think perhaps this bill does not go far enough in that direction. I believe I should welcome the opportunity to vote for a bill that would curtail the exclusion with respect to judicial review that are here contained.

Mr. Walter. Mr. Chairman, will the gentleman yield?

Mr. Dolliver. I yield.

Mr. Walter. I would like to call the gentleman's attention to the fact that there is no exclusion whatsoever. The decision of an agency created *by statute that prohibits a review is the only one excluded*. We are anticipating the possibility that some time or other such an agency *will be erected*.” (Emphasis supplied.)

“Mr. Dolliver. I was referring to exactly the point that the gentleman has raised, that there are certain statutory exclusions now existing which are not covered by this bill. Perhaps there is just one agency and I believe the gentleman and I understand which one that is. I still say I would welcome an opportunity to consider legislation which would include that excluded agency.” (Congressional Record, May 24, 1946, p. 5658.)

And in Representative Walter's presentation of the bill to the House for passage, he discussed the bill section by section and remarked as follows:

“JUDICIAL REVIEW, SECTION 10

Section 10 is a comprehensive statement of the right, mechanics, and scope of judicial review. It requires an effective, just, and complete determination of every case and every relevant issue. It is a means of enforcing all forms of law and all types of legal limitations. Every form of statutory right or limitation would thus be subject to judicial review under the bill. It would not be limited to constitutional rights or limitations alone—see *Perkins v. Lukens Steel Co.*, (310 U.S. 113).

Two general exceptions are made in the introductory clause of section 10. The first exempts all matters so far as statutes preclude judicial review. Congress has rarely done so. Legislative intent to forbid judicial review must be, if not specific and in terms, at least clear, convincing, and unmistakable under this bill. The mere fact that Congress has not expressly provided for judicial review would be completely immaterial—see *Stark v. Wickard* (321 U.S. 288 at p. 317). * * *” (Congressional Record, May 24, 1946, pp. 5654, 5655, 5658.)

In the Senate, the same point of view was presented by Senator McCarran, the Senate sponsor of the bill. In his discussion just prior to final passage, he said:

“Mr. McCarran. Let me go a little further, because I am very grateful to the Senator for bringing up this question. We asked the Attorney General and the Department of Justice to comment on this bill. I now read to the Senate the Attorney General’s comment:

Section 10 (a): Any person suffering legal wrong because of any agency action, or ad-

versely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review of such action. This reflects existing law. In *Alabama Power Co. v. Ickes* (302 U.S. 464), the Supreme Court stated the rule concerning persons entitled to judicial review. Other cases having an important bearing on this subject are: *Massachusetts v. Mellon* (262 U.S. 447), *The Chicago Junction Case* (264 U.S. 258), *Sprunt & Son v. United States* (281 U.S. 249), and *Perkins v. Lukens Steel Co.* (310 U.S. 113). An important decision interpreting the meaning of the terms 'aggrieved' and 'adversely affected' is *Federal Communications Commission v. Sanders Bros. Radio Station* (309 U.S. 470)." (Congressional Record, March 12, 1946, p. 2153.)

This was referred to by Senator Austin a few minutes later:

"Mr. Austin. Mr. President, will the Senator yield to me once more?

Mr. McCarran. Yes; I yield.

Mr. Austin. Is it not true that among the cases cited by the distinguished Senator were some in which no redress or no review was granted, solely because the statute did not provide for a review?

Mr. McCarran. That is correct.

Mr. Austin. And is it not also true that, because of the situation in which we are at this moment, this bill is brought forward *for the purpose of remedying that efect and providing a review to all persons who suffer a legal wrong or wrongs* of the other categories mentioned?" (Emphasis supplied.)

“Mr. McCarran. That is true; the Senator is entirely correct in his statement.” (Congressional Record, March 12, 1946, p. 2154.)

Senator Austin reverted to the point again:

“Mr. Austin. Mr. President, will the Senator yield at this point?

Mr. McCarran. I yield.

Mr. Austin. In the event that there is no *statutory* method now in effect for review of a decision of an agency, does the distinguished author of the bill contemplate that by the language he has chosen he has given the right to the injured party or the complaining party to a review by such extraordinary remedies as injunction, prohibition, quo warranto and so forth?

Mr. McCarran. My answer is in the affirmative. That is true.

Mr. Austin. And does he contemplate that even where there is *no statutory authority* for certiorari, a party might bring certiorari against one of these agencies?

Mr. McCarran. Unless the basic statute prohibits it.

Mr. Austin. I thank the Senator.” (Emphasis supplied.) (Congressional Record, March 12, 1946, p. 2159.)

Senator Barkley raised a question which made it clear that the statutory preclusion must be specific:

“Mr. Barkley. Mr. President, will the Senator yield?

Mr. McCarran. I yield.

Mr. Barkley. The bill assumes then that when Congress has heretofore passed legislation providing *that there shall be no access to a court*, Con-

gress had a particular reason for enactment of such legislation, and the bill's provisions would also apply to future legislation of a similar kind.

Mr. McCarran. Yes * * *'' (Emphasis supplied.) (Congressional Record, March 12, 1946, p. 2157.)

And finally, in a discussion between Senator McCarran and Senator McKellar, it was demonstrated that the principle purpose underlying the Act was to provide appeal to the Courts:

“Mr. McKellar. Mr. President, will the Senator again yield?

Mr. McCarran. I yield.

Mr. McKellar. May I ask the Senator a very general question, which will show that I have not examined the bill with care? Do I correctly understand that the *principal purpose* of the bill is to allow persons who are aggrieved as the result of acts of governmental agencies to appeal to the courts?

Mr. McCarran. Yes.

Mr. McKellar. That is the general underlying purpose of the bill?

Mr. McCarran. Yes. * * *'' (Emphasis supplied.) (Congressional Record, March 12, 1946, pp. 2156-57.)

Congressional discussion of the *scope* of the review provided demonstrates that except where Congress had specifically excluded it, it was to change the existing law and broaden review. This is indicated by a colloquy which occurred between Senator McCarran and Senator Donnell during Senator McCarran's discussion of the provisions of Section 10 that “any per-

son suffering legal wrong because of any agency action" is entitled to judicial review:

"Mr. Donnell. Mr. President, will the Senator yield for an inquiry?

Mr. McCarran. I yield.

Mr. Donnell. I should like to ask the distinguished Senator a question. Section 10 of the bill recites in part that—

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) Right of review: Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

It has occurred to me the contention might be made by someone in undertaking to analyze this measure that in any case in which discretion is committed to an agency, there can be no judicial review of action taken by the agency. The point to which I request the Senator to direct his attention is this: In a case in which a person interested asserts that, *although the agency does have a discretion vested in it by law, nevertheless there has been abuse of that discretion*, is there any intention on the part of the framers of this bill to preclude a person who claims abuse of discretion from the right to have judicial review of the action so taken by the agency?" (Emphasis supplied.)

"Mr. McCarran. Mr. President, let me say, in answer to the able Senator, that the thought uppermost in presenting this bill is that where an

agency without authority or by caprice makes a decision, then it is subject to review.” (Congressional Record, March 12, 1946, pp. 2153 to 2154.)

Mr. Walter’s discussion of the bill in the House contained the following:

“SCOPE OF REVIEW, SECTION 10 (E)

* * * * *

The term ‘substantial evidence’ as used in this bill means evidence which on the whole record as reviewed by the court and in the exercise of the independent judgment of the reviewing court is material to the issues, clearly substantial, and plainly sufficient to support a finding or conclusion affirmative or negative in form under the requirements of section 7(c) heretofore discussed. Under this section the function of the courts is not merely to search the record to see whether it is barren of any evidence, or lacking any vestige of reliable and probative evidence, or supports the agency action by a scintilla or by mere hearsay, rumor, suspicion, speculation, and inference.—cf. *Edison Co. v. Labor Board* (305 U.S. 197, 229-230). Under this bill it will not be sufficient for the court to find, as the late Chief Justice Stone pointed out within the year, merely that there is some ‘tenuous support of evidence’—*Bridges v. Wixon* (326 U.S. at 178). Nor may the bill be construed as permitting courts to accept the judgments of agencies upon unbelievable or incredible evidence.

* * * * *

(Congressional Record, May 24, 1946, pp. 5654 to 5655.)

That the Act was intended to extend the scope of review was made clear by Mr. Walter's discussion of Section 10(D):

“TEMPORARY RELIEF, SECTION 10 (D)

Of importance in the field of judicial review is the authority of courts to grant temporary relief pending final decision of the merits of a judicial-review action. Accordingly section 10 (d) provides that any agency may itself postpone the effective date of its action pending judicial review or, upon conditions and as may be necessary to prevent irreparable injury, reviewing courts may postpone the effective date of contested action or preserve the status quo pending conclusion of judicial-review proceedings.

The section is a definite statutory statement *and extension of rights* pending judicial review. It thus, so far as necessary, *amends statutes* conferring exclusive authority upon administrative agencies to take or withhold action. Its operation will involve no radical departures from what has generally been regarded as an essential and inherent right of the courts; but, however that may be, this provision confers full authority to courts to protect the review process and purpose otherwise expressed in section 10.” (Emphasis supplied.) (Congressional Record, May 24, 1946, p. 5654.)

As is noted in 49 Columbia Law Review, 73 at p. 75, the legislative history of the Act demonstrates what may be a difference in point of view between the Attorney General and the Congress. This possible differ-

ence was recognized in the Senate by Senator McCarran who remarked:

“The bill includes several types of incidental procedures. It confers numerous procedural rights. It limits administrative penalties. It contains more comprehensive provisions for judicial review for the redress of any legal wrong. And, since it is drawn entirely upon a functional basis, it contains no exemptions of agencies as such.

The pending bill is more complete than the solution favored by the majority of the Attorney General's committee, but is, at the same time, shorter and more definite than the proposal of the minority of that committee. While it follows generally the views of good administrative practice as expressed by the whole of that committee, it differs in several important respects.

The bill provides that agencies may choose whether their examiners shall make the initial decision or merely recommend a decision, whereas the Attorney General's committee made mandatory a decision by examiners.

The bill provides some general limitations upon administrative powers and sanctions, particularly in the rigorous field of licensing, while the Attorney General's committee did not touch upon that subject.

This bill relies upon independence, salary security, and tenure during good behavior of examiners within the framework of the civil service, whereas the Attorney General's committee favored short-term appointments approved by a special Office of Administrative Procedure.” (Congressional Record, March 12, 1946, p. 2151.)

In the House, Mr. Walter made reference to the attitude of the sponsors of the bill, and the provisions of the bill, regarding examiners. He there remarked:

“EXAMINERS, SECTION 11

One of the most controversial proposals in the field of administrative law relates to the status and independence of examiners who hear cases where agencies themselves or members of boards cannot do so. I have heretofore referred to this problem in my discussion of section 8 respecting decisions. Both sections 7 and 8 authorize the use of examiners. Section 11, which I am about to discuss, provides for their selection, tenure, and compensation.

It is often proposed that examiners should be entirely independent of agencies, even to the extent of being separately appointed, housed, and supervised. At the other extreme there is a demand that examiners be selected from agency employees and function merely as clerks. In framing this bill we have rejected the latter view, as the Attorney General's committee on administrative procedure throughout the greater part of its final report rejected it, and have made somewhat different provision for independence. Section 11 recognizes that agencies have a proper part to play in the selection of examiners in order to secure personnel of the requisite qualifications. However, once selected, under this bill the examiners are made independent in tenure and compensation by utilizing and strengthening the existing machinery of the Civil Service Commission.

Accordingly, section 11 requires agencies to appoint the necessary examiners under the civil

service and other laws not inconsistent with the bill. But they are removable only for good cause determined by the Civil Service Commission after a hearing, upon the record thereof, and subject to judicial review. Moreover, their compensation is to be prescribed and adjusted only by the Civil Service Commission acting upon its independent judgment. The Commission is given the necessary powers to operate under this section, and it may authorize agencies to borrow examiners from one another.

If there be any criticism of the operation of the civil-service system, it is that the tenure security of civil service personnel is exaggerated. However, it is precisely that full and complete tenure security which is widely sought for subordinate administrative hearing and deciding officers. Section 11 thus makes use of past experience and existing machinery for the purpose." (Congressional Record, May 24, 1946, p. 5655.)

Senator McCarran, by way of summary, indicated that this bill was expressly designed to do more than codify existing administrative law. He said:

"I cannot emphasize too strongly that the bill now before the Senate is not a specification of the details of administrative procedure. Neither is it a codification of administrative law. It represents, instead, an outline of minimum basic essentials, framed out of long consideration and in the light of the comprehensive studies I have previously mentioned." (Congressional Record, March 12, 1946, p. 2151.)

Comment on availability of review appearing in 49 Columbia Law Review 73, cited *supra*, at p. 80, appears to state the problem thoroughly:

“Is review of deportation orders precluded by statute within the meaning of Section 10 by virtue of the provision in the Immigration Act concerning the finality of the decision of the Attorney general;⁶⁴ or is this construction negated by the judicial practice of affording review by habeas corpus? The legislative history of the Procedure Act makes no mention of the problem with respect to deportation. However, Representative Walter, Chairman of the Subcommittee of the House Committee on the Judiciary which considered the measure, pointed out that the exclusion clause of Section 10 was intended to provide merely for the unusual situation where judicial review is ‘actually’ precluded.⁶⁵

To the extent that the courts have made habeas corpus available as a method of reviewing deportation orders,⁶⁶ the decision of the Attorney General has not in effect been ‘final’, nor has it been ‘committed to agency discretion.’ It would seem presumptuous at best to say that the same statute which has long been interpreted by the courts as permitting at least one form of judicial review now precludes it. In *United States ex rel. Trinler v. Carusi*⁶⁷ the Circuit Court of Appeals for the Third Circuit employed this reasoning in holding that Section 10 was applicable to deportation proceedings. A New York District Court reached the same conclusion in *United States ex rel. Cammarata v. Miller*⁶⁸ in reliance on the *Trinler* analysis. The same court had in an earlier decision tacitly assumed the applicability of Section 10.⁶⁹ Moreover, by declaring that Section 10 will effect

no 'appreciable change' in existing 'principles,'⁷⁰ the former Commissioner of Immigration presumably concurred in this view.

The only court to have reached a contrary result⁷¹ approved the dissent in the *Trinler* case, which declared that habeas corpus was not a form of review and hence that the finality clause of the Immigration Act had not been impaired by judicial practice.⁷² *However, this position seems untenable in view of Section 10(b) of the Procedure Act which specifically includes habeas corpus as a form of review.*⁷³" (Emphasis supplied.)

"65. 92 Cong. Rec. 5654. The House Report states: 'To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its fact give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold it.' H.R. Rep., *supra* note 23 at 41.

67. 166 F. (2d) 457 (3d Cir. 1948).

68. 79 F. Supp. 643 (S.D.N.Y. 1948).

69. United States *ex rel.* Lindenau v. Watkins, 73 F. Supp. 216 (S.D.N.Y. 1947), *rev'd on other grounds sub nom.*, United States *ex rel.* Pateau v. Watkins, 164 F. (2d) 457 (2d Cir. 1947).

71. Lee Tack v. Clark, Civil No. 46-279, S.D. N.Y., June 30, 1948; *cf.* Azzollini v. Watkins, 17 U.S.L. WEEK 2201 (S.D.N.Y. Oct. 18, 1948) (§ 10 inapplicable to deportation, but even if applicable, facts of petition insufficiently pleaded to warrant stay of deportation pending review).

72. See 166 F. (2d) 457, 462 (2d Cir. 1948)."
(Some footnotes omitted.)

II. APPLICATION OF THE PROCEDURAL REQUIREMENTS OF THE ACT TO DEPORTATION HEARINGS.

The application of the procedural requirements of the Act to deportation hearings has been passed upon by the Court of Appeals for the District of Columbia in *Wong Yang Sung v. Clark*, 80 F. Supp. 235, affirmed without opinion, 174 F. (2d) 158. The first problem presented by the Act is whether the hearing and a decision on the record which brings Section 5 into play is required "by statute". This problem has been discussed in appellants' opening brief. Further research into the legislative history of the Act discloses that Congressman Walter referred to the policy behind the provisions of Section 5. He said:

"Mr. Walter. * * * Section 5 relates to the judicial functions of administrative agencies when they decide specific cases respecting compliance with existing law or redress under existing law. It applies, however, only where Congress by some other statute has prescribed that the agency shall act only upon a hearing and, even in that case, there are six exceptions. The requirements of Section 5 are thus limited to cases in which statutes otherwise require a hearing, *because, where statutes do not require an agency hearing, the parties are entitled to try out the pertinent facts in court and hence there is no reason for prescribing informal administrative procedure* beyond the requirements of Section 6 which I will discuss presently * * *" (Emphasis supplied.) (Congressional Record, May 24, 1946, p. 5756.)

Since except in cases where a claim of citizenship is made, a deportee may not try the facts *de novo* in

Court, this clearly removes deportation hearings from the exception in Section 5 of the Act.

Appellee relies in part upon another alleged exception in the Act, that relating to "foreign affairs functions" of the United States, citing *Pantelis Yiakoumis et al. v. Hall*, 83 Fed. Supp. 469. That deportation procedures were not included within the concept of foreign affairs functions is demonstrated by the following excerpts from Congressional debate:

"Mr. Walter. * * * The exempted foreign affairs are those diplomatic functions of *high importance which do not lend themselves to public procedures* and which with the general public is ordinarily not directly concerned." (Emphasis supplied.) (Congressional Record, May 24, 1946, p. 5755.)

A more serious question is presented by the language of Section 7(a) of the Act which contains the exception "* * * but nothing in this act shall be deemed to supersede the conduct of specified classes of proceedings in whole or in part by or before boards or other officers specially provided for by or designated pursuant to statute." The legislative history of the Act discloses that hearings were held by a subcommittee of the Senate Committee on the Judiciary in 1941 on three bills, which preceded the bill which subsequently became the Act. Those bills were designated S. 674, S. 675 and S. 918. On April 30, 1941, Major Lemuel B. Schofield, Special Assistant to the Attorney General in Charge of the Immigration and Naturalization Service, testified before the committee

with regard to the application of these bills to the Immigration and Naturalization Service. See *Hearings before a Subcommittee of the Committee on the Judiciary*, Part 2, April 30 to May 22, 1941, p. 556, et seq.

Major Schofield discussed the work of the Service in considerable detail and considered the effect of the bills upon the Service as a whole. In particular, he discussed the application of the provisions of those bills to deportation and exclusion hearings. His statement on these points assumed at all times that the legislation then under consideration would apply to deportation and exclusion hearings, that it would require a change in the procedure of the Service, that it would require the appointment of special hearing officers for the adjudication of deportation and exclusion cases, and finally, that this would be not only feasible but that it would be desirable.

The provisions of the three bills there under consideration on this point are compared in tabular form in a chart submitted to the Senate subcommittee by Mr. Arthur T. Vanderbilt in connection with his testimony appearing at page 1307, Part 3 of the Report of the hearings cited above. This was submitted in connection with the testimony of the minority members of the Attorney General's committee which appears at pages 1304 to 1418 in Part 3 of the same Report. The table may be found at pp. 1564 to 1577 of Part 4 of the Report. With regard to hearing officers, three bills and proposals of a minority and majority of the Attorney General's committee are compared as follows:

Subject	Walter-Logan bill (H. R. 6324, 76th Cong., 3d sess.)	Measure recommended by majority of Attorney General's Committee (S. 675)	Proposal of minority of Attorney General's Committee (S. 674)	Report of Attorney General's Committee (S. Doc. No. 8, 77th Cong. 1st sess.)	Walter bill (H. R. 3464 and S. 918)
Subordinate hearing officers.	No provision other than above.	Provision for appointment, upon the recommendation of the agency concerned, by an independent Office of Administrative Procedure and removal only for cause after hearing before a similarly independent tribunal; tenure of 7 years at a fixed salary; similar provision for appointment of "provisional" hearing officers for 1 year; provision for appointment of "temporary" hearing officers by a "director" alone; provision for the loan of hearing officers by one agency to another; provision for "chief" hearing officers in agencies having more than five hearing commissioners.	Similar to majority bill, except (1) omission of authority for appointment of "temporary" hearing officers, (2) omission of provisions for "chief" hearing officers, (3) a more flexible salary scale to be adjusted by the independent appointing authority with a prohibition of agency control over salaries, (4) longer tenure, and (5) authority for reappointments by the independent board without the intercession of the agency concerned.	Discussed and recommended at pp. 46-50. See also note at p. 239, explaining the authority changes. One member recommends that subordinate hearing officers be appointed by an independent agency without the recommendation of the agency concerned and that such officers be assigned to no agency but merely be assigned by the independent appointing board "to the hearing of cases as the needs of the agencies require" (p. 250).	Presiding officers to conduct formal hearings outside Washington to be appointed by appropriate United States District Court, I. C. C., and Patent Office proceedings excepted.
Disqualification of hearing officers.	No provision except members of intra-agency boards having previous participation in case or making of rule involved.	Provision for filing of affidavit of disqualification, to be acted on by a "chief" hearing commissioner" in each agency, and the ruling to become a part of the record.	Similar, but affidavit to be passed upon by agency head.	No discussion.....	Presiding officer may withdraw if he deems himself disqualified. No disqualifying procedure.
Powers of hearing officers.	Provision for administration of oaths and issuance of subpoenas.	Provision for administration of oaths, issuance of subpoenas, taking of depositions, regulation of hearings, admission or exclusion of evidence, and rulings upon questions and cross-examination.	Similar to majority provision....	Discussion at p. 50.....	Similar to S. 674.

Major Schofield discussed the provisions of S. 918 and S. 674 with regard to representation of aliens before hearing officers in immigration cases and concluded that they were objectionable to the agency. He then went on to say (Hearings before a Subcommittee of the Committee on the Judiciary, United States Senate, Part 2, p. 571):

“For these reasons, the Service feels that S. 674 and S. 918 are not suited to the proper administration of our laws and would most seriously interfere with such administration. The two bills are inflexible, and lose sight of the particular problems which face us. On the other hand, S. 675 in general charts a far more discriminating course. It has that flexibility which the other two bills lack. It recognizes that there are a great number of matters coming before an agency for which formal procedures are unsuitable. Through section 301, it applies its hearing-commissioner system only to cases where by law formal procedures are now required. In other words, as we read it, its requirements apply only to deportation and exclusion cases.

“If its requirements applied to the other matters which we have to decide, we would, of course, be opposed to that, also, but assuming that its requirements apply only to deportation and exclusion cases, then we think it is much more adaptable to our Service, much more suitable to our Service than the other two.

“Now insofar as deportation cases and exclusion cases are concerned, we already hold hearings and base our decisions upon such hearings. Indeed, S. 675 would make considerable changes in

our existing procedures. Our boards of special inquiry which now hear admission cases would be replaced by independent hearing commissioners. The inspectors who hear deportation cases, would be similarly replaced, and while in such cases, the inspector does not now make a decision, under S. 675, he would make such a decision—that is, the hearing examiner would—which would be appealable to the Board of Immigration Appeals.

“We agree with the view of the majority of the Attorney General’s Committee that it is desirable to vest the power of decision in the man who heard the case and saw the witnesses, insofar as possible. We think that the hearing-commissioner system would improve our present procedures to a considerable extent without stultifying the administration of the laws.”

Appellee makes the point in his brief that it was proposed that whatever act was passed contain a provision, delineating cases where formal hearings were required and where the procedural requirements of the act would apply, to the effect that they should apply only where hearings are “required by the Constitution or statutes to be determined after opportunity for formal hearing.” Appellee’s brief, p. 36. Appellee there cites a portion of Major Schofield’s testimony. The complete discussion by Major Schofield is as follows (*op. cit.*, pp. 577 to 578, Part 2 of the hearing reports):

“Now, when we come to section 301. We think there ought to be some clarification of the first part of that section. As it now reads, it provides that the section—that the act—the section of this

title, as a matter of fact, 'shall be applicable to proceedings where rights, duties, or other legal regulations are required by law to be determined after opportunity for hearing.'

"We think that that ought to be made more specific and that it ought to read something like this: That they shall apply 'only to proceedings wherein rights, duties or other legal relations are required by the constitution or statutes to be determined after opportunity for formal hearing, and if such a hearing be held, only upon the basis of a record made in the course of such hearing.'

In other words, so that it would be clear that this statute would apply only to those matters of administrative function in our service, which are disposed of by formal hearing. This would mean exclusion cases and deportation cases.

We, now, in many instances, grant hearings *in matters where the law doesn't require a hearing*, as for example, an alien who desires an extension of his stay." (Emphasis supplied.)

"We will treat such an alien informally if he calls or through his counsel if he calls, or both together, and if he asks for it, we accord him a hearing, which is formal in its character, and in which he is accorded the right to advance, through testimony and through witnesses, if he desires, his reasons in support of his application for an extension of his temporary visit, but that is purely regulatory, not required by statute, and we don't think that there ought to be a necessity for such a hearing in every one of those thousands of cases, which might be required if the wording of section 301, the first part of it, remains as it is now printed."

This comment discloses that the objection of the Service to the term "required by law to be determined after opportunity for hearing," was not that this would require hearings in deportation cases, since the immigration law has been so interpreted in the absence of a specific statutory requirement of hearing. On the contrary, this change in the wording of the bills then under consideration was suggested with the understanding that exclusion and deportation hearings would still be required to be conducted in conformance with the procedural requirements of the bills and would, of course, require hearings. The only reason for proposing the changed language was that as the bills then stood, they might be interpreted as requiring hearings in matters which were then, and are now, adjudicated by the Department without a hearing in the exercise of ordinary administrative discretion.

Reference was made in appellants' opening brief to the statement by former Commissioner of Immigration Carusi in *Immigration and Naturalization Service Monthly Review*, 95,103, in which the Service took the position that it was not subject to the Act because the Immigration statute does not in terms require a hearing. Mr. Carusi did not there take the position that the exception in Section 7 (a) applied. Taken in connection with Major Schofield's testimony cited above this demonstrates that until very recently the Service made no contention that the hearing officers provided in 8 USCA § 152 were such statutorily designated officers as to come within the exception of the

Act. The attitude of the Service during Congressional consideration of this bill was that the Service welcomed the advent of new hearing officers, who would replace immigrant inspectors in deportation hearings.

There have, however, been several cases in which a similar contention has been passed upon by the courts. In *Loufakis v. U. S.*, 81 F. 2d 966, the Third Circuit considered an appeal from a contempt order directed against an alien who refused to answer questions in a deportation hearing. The court decided the case upon the erroneous ground that the constitutional guarantee against self-incrimination is not applicable to deportation proceedings. By way of dictum, it stated:

“We are not convinced by the appellant’s contention that the provisions of the above-quoted statute are restricted to exclusion cases. In our opinion the wording is sufficiently comprehensive to include deportation cases. The section by its very terms refers to aliens residing in the United States, and to evidence touching the right of any alien to reside in the United States. As it is too late to exclude an alien when he is already within the United States, it is obvious that the intent of Congress was to grant the requisite power in the event that it should be necessary to deport the alien. We think the District Court had the power to make the order and that the appellant’s refusal to comply amounted to contempt. The order is affirmed.”

The *Loufakis* case was followed without any extended discussion in *Graham v. U. S.*, 99 F.2d 746, in

which the Ninth Circuit Court incidentally pointed out the error of the Third Circuit on the question of self-incrimination.

The only case in which any extended discussion was given to the question of the application of 8 USCA § 152 to deportation cases was *U. S. v. Parsons*, 22 F. Supp. 149. In that case, Judge Yankwich of the District Court for the Southern District of California discussed at some length the contention that § 152 applied only to exclusion cases. This question is important in view of the fact that Judge Holtzoff of the District Court for the District of Columbia based his decision in *Wong Yang Sung, v. Clark*, 80 F. Supp. 235, affirmed in 174 F. 2d 158, upon the ground that this section clearly constituted a designation of hearing officers. The case before him was a deportation, as distinguished from an exclusion case.

Judge Yankwich, as did the other courts considering this proposition, found that the provision of the statute saying that immigrant inspectors should conduct the examination of aliens regarding their right to "reside in" the United States had reference to aliens who were already in the country and were, therefore, subject to deportation, rather than exclusion proceedings. He said:

"If we examine the section in which the clause appears, it seems in the wrong place. It is preceded by provisions relating to the right of inspectors to examine persons who seek admission into the United States and is followed by provisions penalizing those who seek to interfere with the performance of these duties.

“However, it is a cardinal rule of statutory construction that effect will be given to legislative intent and legislative language, and that an interpretation should not be adopted which would make a provision meaningless or senseless * * * The right to ‘enter, re-enter, or pass through’ the United States, of which the enactment speaks, could refer only to persons who seek admission, by seeking to enter for the first, or to re-enter or to pass through the United States on their way to another country. But the words, ‘reside in the United States,’ could only refer to a person *who is in the United States* and desires to continue to reside therein. They were so interpreted in *Loufakis v. United States*, 3 Cir., 1936, 81 F. 2d 966. The interpretation accords with the evident aim of the statute.

“The power given to courts to command attendance before the Commissioner or Inspector and compel testimony to be given would be meaningless, unless we postulate that the Congress had in mind persons already within the United States. An alien, when he seeks admission to the United States, does not have the power to command what we shall or shall not do. We have the right to exclude whomever we wish and for any reason whatsoever, because we do not approve an alien’s political or social ideas, or he belongs to groups which are likely to become a public charge, or for other similar reasons * * *

“If an alien seeking admission should decline to answer questions concerning his right to be in the United States, it would be a useless act on the part of the Immigration Commissioner or Inspector to seek an order from a United States Court

to compel him to give testimony. Why ask for it when all he need do is to say to the alien, 'If you do not answer the questions concerning your right to enter the United States, you shall not enter.' If an order should be secured, how would it be served on the alien? If the alien be detained at a seacoast port, pending the determination of his right to enter, he might be detained on an isle or on board ship and there served. But assume the alien is at the Canadian or Mexican border and is not allowed to cross it. Process cannot be issued by a District Court effective beyond its territorial jurisdiction. Nor can it be served there * * * Unless, therefore, we give effect to the words 'reside in the United States,' and apply the clause to deportation proceedings, the right of immigration authorities, in the performance of their duties under the law, in enforcing the uncontested right of a sovereign power to determine whom it shall receive within its borders, would be rendered ineffective."

The statute in question here provides, as Judge Yankwich noted, for the examination of aliens seeking admission into the United States. It then provides that immigrant inspectors are authorized to search any vehicles in which they believe aliens are "being brought into" the United States. Then follows the provision that these inspectors shall have the power to administer oaths and take and hear evidence "touching the right of any alien to enter, re-enter, pass through, *or reside* in the United States * * *" (emphasis supplied). The courts in the three cases discussed above have felt that the words "or reside"

refer to persons in the United States. An equally logical interpretation is that the immigrant inspectors, in examining aliens who seek to enter the United States, are to examine them regarding their right to enter for the purposes of conducting a business here in the status of "treaty merchants," or to enter for the purpose of studying at American universities, or for the purpose of passing through the United States enroute to some other country, or to reside in the United States as permanent residents thereof. Nothing in this section of the Act requires the words "or reside" to be interpreted as applying only to those who are already within the United States, since the purpose of those who seek to enter the United States, may be to reside here, or visit temporarily, or to do some other thing in the United States not ordinarily comprehended within the meaning of the term "reside." And when it is considered that this term occurs in a section, all of whose provisions except this one clearly refer to the examination of aliens seeking admission to the United States, there appears to be no reason for preferring appellee's interpretation and a great deal of reason for construing this phrase in harmony with the remainder of the section in which it appears.

A ready answer appears to Judge Yankwich's question, what was the purpose of inserting in this section powers of contempt to be used against those who fail to appear and testify before immigrant inspectors. There is nothing in the Act to indicate that the contempt proceedings were to be instituted against the

alien seeking admission. But they clearly would apply to and be useful in compelling the testimony of others who possessed information or documents relating to the right of the alien to enter the United States.

It is these persons against whom the weapon of contempt proceedings was aimed. The reason for Judge Yankwich's decision, upon examination, appears to be less than compelling.

In this District, in the case of *Wong So Wan* and *Wong Tuey Wan*, 82 F. Supp. 60, cited by appellee on page 58 of his brief, Judge Goodman remarked that the Administrative Procedure Act "certainly" does not apply to preliminary examinations in exclusion cases. The theory supporting this is apparently that the designation of immigrant inspectors as statutory hearing officers in exclusion cases is even more crystal clear than their designation for deportation hearings. Yet the practice of the Service has been to assign to Boards of Special Inquiry, pursuant to the provisions of 8 USCA § 153, persons who are not immigrant inspectors and who presumably do not possess the special qualifications which are claimed for these persons. See *Immigration and Nationality Laws and Regulations* as of March 1, 1944, p. 819, Part 130 § 130.1:

"Boards of special inquiry shall be composed of three members. Boards shall consist of duly designated immigrant inspectors, one of whom shall act as chairman, except that a duly designated immigration employee may serve as the third member and secretary."

The statutory authority for this is the provision in 8 USCA § 153 regarding boards of special inquiry:

“Each board shall consist of three members, who shall be selected from such of the immigrant officials in the Service as the Commissioner of Immigration and Naturalization, with the approval of the Attorney General, shall from time to time designate as qualified to serve on such boards.”

This should be considered in the light of the portion of 8 USCA § 152, which provides that:

“The inspection, other than the physical and mental examinaation, of aliens, * * * shall be conducted by immigrant inspectors except as herein-after provided in regard to boards of special inquiry * * * Every alien who may not appear to the examining immigrant inspector at the port of arrival to be clearly and beyond a doubt entitled to land, shall be detained for examination in relation thereto by a board of special inquiry.”

The statutory scheme apparently was for the examination of aliens seeking to enter the United States, at the port of entry, in an informal manner, by an immigrant inspector. In the even the immigrant inspector felt some doubt as to the right of the alien to land, he was to be examined by a board of special inquiry, whose composition was, by Congress, left in the discretion of the Attorney General. This board could be composed of immigrant inspectors or of any other authorized persons.

That this was the practical interpretation given by the Service to these code sections before the passage

of the Act is demonstrated by Major Schofield's testimony before the Senate subcommittee. He was discussing the salary levels of the new hearing officers who would be required by the legislation which the committee was considering and he stated, at p. 573 of the report of the hearings:

"Major Schofield. The committee must realize that *an immigrant inspector performs many other duties in addition to conducting hearings*, and his services would still be required to perform those other duties. Ships must be boarded, seamen must be examined and fingerprinted, papers must be lifted, trains must be boarded, airplanes must be met and the passengers examined, and so on.

"Last year, the fiscal year ending June 1940, we made at seaports alone 1,600,890 examinations of one kind or another. People seeking to come in—that includes everybody; sailors, passengers, citizens, non-citizens, every kind.

"At the land-border ports there were arrivals to the number of 50,102,398.

"Senator Danaher. That includes border crossings, doesn't it?

"Major Schofield. Everything. Repeated crossings. Commuters and everybody, but they all must be examined. It includes aliens and citizens, too, but there were that many examinations which had to be made by our Service. So that the total for the fiscal year ending 1940 and 51,703,288. Now that means that we must have an adequate staff and force of immigrant inspectors, and so if we are by statute now to provide for hearing commissioners in the main, not entirely, but in

the main they will have to be appointed new. Additional personnel in our Service.” (Emphasis supplied.) [Hearings before a Subcommittee of the Committee on the Judiciary, U. S. Senate, Part 2, April 30 to May 22, 1941].

Reference has already been made to the fact that there is some difference of interpretation revealed in the Congressional debate and the comments of the Attorney General. That the Congressional debate is controlling in such a situation is axiomatic. It is the Congressional intent that we are seeking to determine. But assuming for the sake of argument that the legislators may have had in mind the Attorney General’s comments when this Act was passed, and that the Congressional intent is not therefore entirely free from doubt, what of the policy of the law with regard to the question presented in this case? The separation of investigating and prosecuting officers of administrative agencies from adjudicating officers is a development to which the courts, the bar and Congress have frequently given attention. The evils of combining these functions in the same persons are nowhere more clearly illustrated than in cases like those here before this Court.

Here, the presiding inspector is required to determine, under the issues presented by the warrant for the arrest and deportation of these aliens, whether the aliens belonged to the Communist Party. The inspector must then, if he determines this in the affirmative, determine whether or not this organization is one which advocates the overthrow of the Government

of the United States by force or violence or other unconstitutional means. The immigrant inspector is a subordinate of the Attorney General. The Attorney General, under the provisions of the President's Loyalty Order, 12 Fed. Register 1935, has already determined this question. The immigrant inspector is therefore free to decide the question in any other way only at the risk of incurring doubt of his own loyalty to the Government of the United States. See 58 Yale Law Review 1, where Professor Tom Emerson and others discuss the all-prevailing fear of loyalty investigations which has been produced by the President's Order. An independent determination of this question can be expected only from a hearing officer whose independence is assured by those safeguards intended by Congress to be secured by the Act and referred to in the Senate debate quoted *supra* at p. 16.

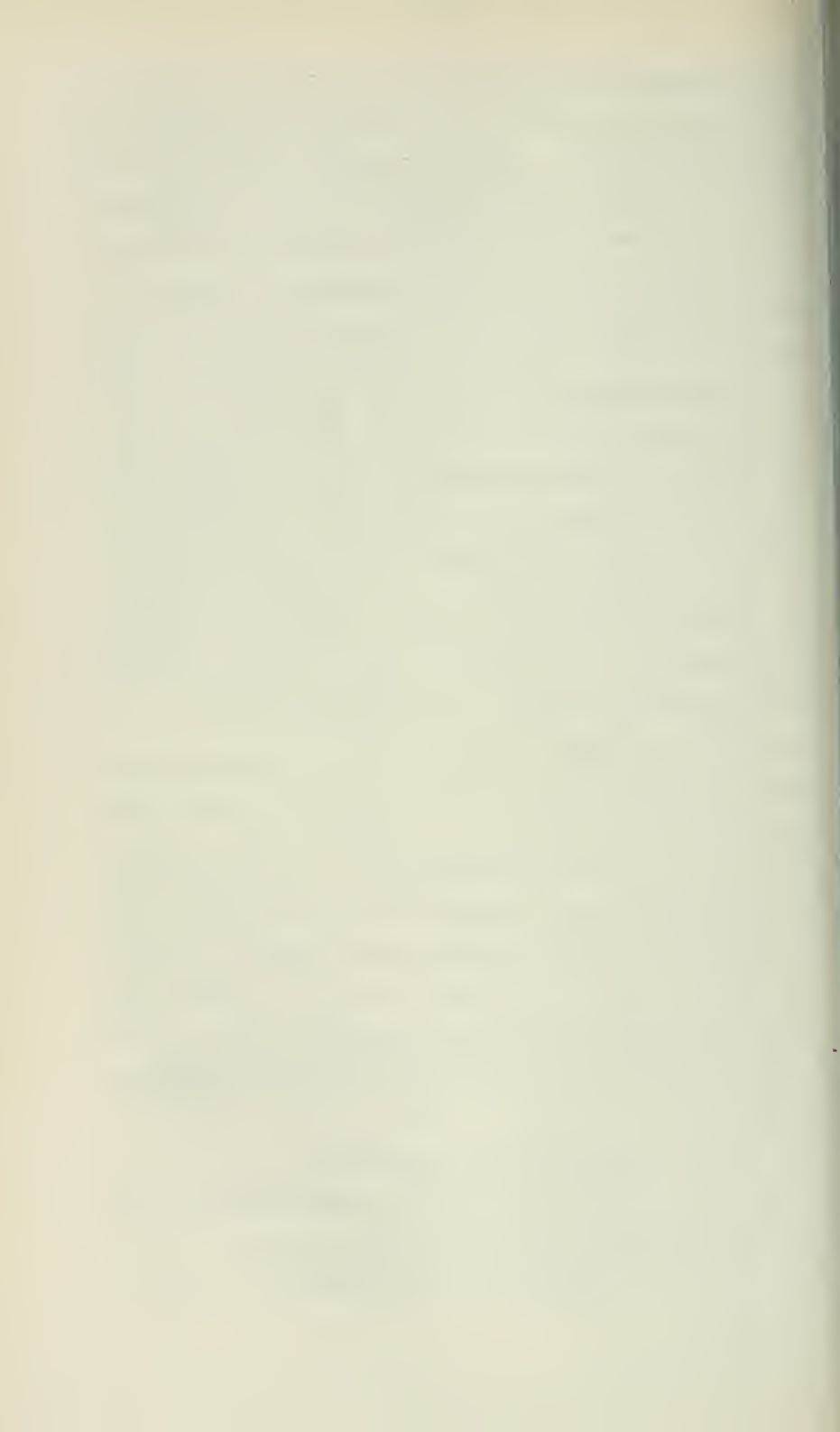
It is respectfully submitted that the Congressional intent, first of all to provide judicial review other than by habeas corpus in deportation cases, and secondly, to require deportation hearings to be conducted in conformance with Sections 5, 7 and 8 of the Act, is quite clear. And upon reason and policy, it is maintained that this Court should give effect to that Congressional intent notwithstanding the decision of the Court of Appeals for the Second Circuit to the contrary.

Respectfully Submitted,

GLADSTEIN, ANDERSEN, RESNER & SAWYER,

By LLOYD E. McMURRAY,

Attorneys for Appellants.



No. 12175

United States
Court of Appeals
for the Ninth Circuit

IN RE J. ROBERT PATTERSON;
J. ROBERT PATTERSON,
Appellant,
vs.

THE STANDING COMMITTEE ON DISCIPLINE TO THE BAR OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON,
Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Oregon

FILED

MAR 28 1949

United States
Court of Appeals
for the Ninth Circuit

IN RE J. ROBERT PATTERSON;
J. ROBERT PATTERSON,
Appellant,
vs.

THE STANDING COMMITTEE ON DISCIPLINE TO THE BAR OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Portland, Oregon,
For Appellant.

HENRY L. HESS,
United States Attorney,

EDWARD B. TWINING,
Assistant United States Attorney,
United States Court House,
Portland, Oregon, and

JAMES C. DEZENDORF,
representing the Standing Committee on Discipline to the bar of this Court,
Pacific Building, Portland, Oregon,
Appearing on behalf of this Court.

In the District Court of the United States
For the District of Oregon

No. D-3

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. ROBERT PATTERSON,

Defendant.

FIRST AMENDED COMPLAINT IN
DISCIPLINARY PROCEEDINGS

To the Honorable James Alger Fee and Claude
McColloch, Judges of The District Court of the
United States, for the District of Oregon:

The First Amended Complaint of David Lloyd
Davies, Samuel H. Martin, R. A. Leedy and James
C. Dezendorf respectfully alleges and shows:

I.

This First Amended Complaint is made by David
Lloyd Davies, Samuel H. Martin, R. A. Leedy and
James C. Dezendorf as the Standing Committee
on Discipline to the Bar of this Court.

II.

That J. Robert Patterson, who resides at Mil-
waukie, Clackamas County, Oregon, at all times
hereinafter mentioned has been an attorney at
law, duly licensed to practice before this court,
and a duly appointed and acting Assistant United
States Attorney.

III.

That J. Robert Patterson has been guilty of misconduct in the following particulars:

(a) That on October 8, 1945, he filed a complaint in this court on behalf of Marvin L. Hughes, Plaintiff, vs. Alaska Steamship Company, a corporation, Defendant, Civil No. 2923, and thereafter prosecuted said cause to a conclusion, although he well knew that one of the principal defenses that would be urged by the Defendant was that the Plaintiff's claim, if any, should be asserted against the United States of America, whom he was not in a position to sue because of his office as Assistant United States Attorney.

(b) That on or about the 30th day of August, 1946, he accepted employment by one Westley Bowden, who was charged in the Circuit Court of the State of Oregon, for Multnomah County, with the crime of murder, and he represented said Westley Bowden at the trial and accepted a fee therefor although he expected to be called as a witness at the trial of said Westley Bowden and although the Attorney General's manual governing the conduct of United States Attorneys directs that United States Attorneys shall not represent a person charged with a crime in a State Court.

(c) That on or about February 12, 1947, he offered to represent one Joseph Martin for a fee in connection with proceedings to procure the release of certain wages earned by the said Joseph

Martin which were deposited in the registry of the United States District Court at San Francisco, California, although said Joseph Martin was referred to him in his capacity as Assistant United States Attorney and such matters are customarily handled by United States Attorneys without compensation therefor.

(d) That on December 7, 1945, and on January 4, 1946, he appeared in this court as Assistant United States Attorney, representing the United States of America in two criminal proceedings brought by the said United States of America against Eugene Russell Costello, being numbers 16714 and 16715, although he was then associated in the practice of law with Milton R. Klepper, who appeared in said proceedings representing the said Eugene Russell Costello, the Defendant therein.

(e) That commencing on or about October 2, 1946, he represented that he was and held himself out as practicing law as a member of a partnership composed of Milton R. Klepper, McDannell Brown and himself, although he was not then and is not now a partner with Milton R. Klepper and McDannell Brown or with either of them.

Wherefore, your Complainants pray that the said J. Robert Patterson be ordered to make answer to this First Amended Complaint and that if upon trial of the issues he be found guilty of the matters herein charged his license to practice law before this court be revoked, annulled or

suspended or that he be otherwise punished or reprimanded and that such other relief be granted in the premises as to the court may seem just.

/s/ DAVID L. DAVIES,
/s/ SAMUEL H. MARTIN,
/s/ ROBERT A. LEEDY,
/s/ JAMES C. DEZENDORF,

Standing Committee on Discipline to the Bar of
this Court.

(Acknowledgment of Service.)

State of Oregon,
County of Multnomah—ss.

I, David Lloyd Davies, I, Samuel H. Martin, I, R. A. Leedy, and I, James C. Dezendorf, being first duly sworn, say: That I am a member of the Standing Committee on Discipline to the Bar of this Court and I am one of the Complainants in the within entitled cause and the foregoing Amended Complaint is true as I verily believe.

DAVID L. DAVIES,
SAMUEL H. MARTIN,
ROBERT A. LEEDY,
JAMES C. DEZENDORF.

Subscribed and sworn to before me this 4th day
of December, 1947.

(Seal) LOWELL MUNDORFF,
Clerk.

By F. L. BUCK,
Chief Deputy.

[Endorsed]: Filed December 4, 1947.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant above named and for answer to the Amended Complaint admits, denies and alleges:

I.

Admits paragraphs numbered I and II of the Amended Complaint.

II.

Answering Paragraph III of the Amended Complaint, defendant admits, denies and alleges:

Answer to Sub-Paragraph (a)

Answering sub-paragraph (a) of the Amended Complaint, defendant denies the allegations thereof, except as admitted, qualified, or alleged herein. Defendant admits that on the 8th day of October, 1945, he, as co-counsel with Milton R. Klepper, filed a complaint in this Court on behalf of one Marvin L. Hughes as plaintiff and against Alaska Steamship Company, a corporation, defendant, Civil No. 2923, and that thereafter said cause was prosecuted to a conclusion. Defendant further admits that he knew that one of the defenses which would be urged by said defendant corporation was that plaintiff's claim, if any, should be asserted against the United States of America. Defendant admits that by virtue of his employment as Assist-

ant United States attorney, he would have been without authorization to bring a suit against the United States of America. Defendant further alleges that he acted in good faith and pursuant to his best judgment of the legal status of his client's claim against said steamship company and defendant was informed and believed in respect thereto, that his client had no claim whatsoever against the United States of America, which said opinion has, as defendant understands, since been confirmed by the Supreme Court of the United States and other courts. Defendant further alleges that while he was serving as Assistant United States Attorney, similar cases, involving seamen, were filed and tried in this Court and that the defendants in such cases were not represented by the United States Attorney's office or by any one in behalf of the United States, so far as defendant was informed, and that such defenses in such cases were conducted by private attorneys and in behalf of private insurance carriers. That defendant, acting in good faith, did not believe that there would be any conflict between Marvin L. Hughes as plaintiff and the United States of America and/or the U. S. Attorney's office in its behalf, in respect to the litigation aforesaid. Defendant avers that the question of any possible impropriety in his appearance as co-counsel in said litigation was not at any time while said litiga-

tion was in process or at any time whatsoever called to his attention and defendant was not informed at any time of any such conflict of interests involved until on or about the 12th day of March, 1947, the date of the filing of the original complaint herein. That had defendant had the slightest knowledge or suggestion of even a claimed impropriety in his appearance as co-counsel in said cause, he would have immediately resigned as co-counsel and disclaimed all interest in such litigation. That defendant believed at all times herein pertinent that he was protecting the interest of the United States in respect to the issues arising in said cause.

Answer to Sub-Paragraph (b) of Amended Complaint:

Answering sub-paragraph (b) of the Amended Complaint, defendant denies the allegations thereof, except as admitted, qualified, or alleged herein. Defendant admits that on or about the 30th day of August, 1946, he accepted employment by one, James Westley Bowden, who had theretofore been charged in the Circuit Court of the State of Oregon, County of Multnomah, with the crime of murder. Defendant further admits that he served in a nominal capacity as co-counsel in behalf of said Westley Bowden at the trial and accepted a fee therefor. Defendant further admits that the Attorney General's manual governing the conduct of U. S. attorneys provides as follows:

“In the interest of cooperation between the two prosecuting agencies, and for other obvious reasons, assistant U. S. Attys. should not accept employment to defend persons charged with a crime in a state court.”

For further answer and defense defendant alleges that at the time he accepted the particular employment aforesaid, he was serving and had been serving for approximately two years last past as general counsel for the said Bowden and at the time he accepted employment on said particular charge, he was at the same time acting as attorney for said Bowden in divorce proceedings then pending in the Circuit Court of the State of Oregon for the County of Multnomah. That at no time, either prior to the acceptance of said particular employment aforesaid, or thereafter, to and until the 19th day of February, 1947, was defendant informed either directly or by way of suggestion that there was in existence an Attorney General's manual prescribing practices and/or policies in respect to the conduct of United States attorneys or their deputies, nor was defendant informed that by such manual or otherwise the Attorney General had placed any stricture whatsoever upon United States attorneys or their deputies appearing in state courts in respect to litigation and issues, civil or criminal, wherein no possible conflict of interest could arise between the United States on the one hand and a private litigant on the other.

That at the time defendant accepted employment in said particular litigation, to-wit, the case of State of Oregon v. James Westley Bowden, defendant informed the said Bowden that it would not be possible for him to actually try and accept responsibility for the trial of said cause, but that he would be obliged to call in another attorney to take charge of such defense. Thereafter, defendant procured in behalf of said Bowden the services of Edwin D. Hicks, an attorney, who accepted full responsibility in respect to all phases of said defense and who assumed such responsibility throughout the investigation prior to trial and the actual trial of said cause. That defendant's participation therein was in a nominal capacity only. Defendant made no presentations to the jury, either by way of opening statement or argument, and the full extent of his participation consisted of a brief cross-examination of one witness and by being present at the counsel table a part of the time while said trial was in progress. Defendant avers that at no time herein pertinent was defendant aware that he was breaching any ethic or any policy or any rule of propriety in doing that which he did so, as herein alleged, and defendant acted in the utmost of good faith throughout in respect to all phases of the matters and things hereinabove set forth. That had defendant been informed that there was any possibility of a contention of irregularity in this behalf, he

would have immediately withdrawn his name as co-counsel in said cause or taken such other steps as might have been indicated to avoid such contention being made.

Answer to sub-paragraph (c).

Answering sub-paragraph (c) of Paragraph III of the Amended Complaint, defendant denies the allegations thereof, except as admitted, qualified, or alleged herein. Defendant admits that on or about February 12, 1947, one Joseph Martin was referred to defendant in his capacity as Assistant U. S. Attorney in connection with proceedings to procure the release of certain wages theretofore allegedly earned by the said Joseph Martin and which had theretofore been allegedly deposited in the registry of the U. S. District Court at San Francisco, California. Defendant alleges that at the time said Joseph Martin was referred to defendant he was told by said Joseph Martin that such wages were in the registry of said Court at San Francisco, for the reason that he, said Martin, had been theretofore classed as a deserter from a vessel stationed in Sydney, Australia. Defendant informed said Joseph Martin that, in defendant's judgment, the only way by which the said Martin could procure the release of said wages was for him, the said Martin, to proceed to San Francisco, California, and to there take the matter up with the office of the U. S. Attorney at San Francisco or, as an alternative procedure, to employ a lawyer in San Francisco to represent him in such behalf.

The said Joseph Martin was further informed that upon any proceeding for withdrawal of such funds, testimony would have to be taken and that it would be necessary for the said Martin to testify in San Francisco concerning the matters applicable to such claim. The said Martin thereupon informed defendant that he was on probation and was not able to leave the District of Oregon and defendant thereupon told Joseph Martin that he, Martin, would not have any difficulty in securing permission to go to San Francisco for the purpose aforesaid. The said Martin informed defendant that he did not wish to go to San Francisco under any circumstance and the defendant thereupon inquired of the said Martin whether he had an attorney in Portland and the said Martin informed defendant that he did not have, but that his brother had an attorney. The Defendant thereupon advised the said Martin to consult his brother's attorney with respect to such claim, but the said Martin expressed no willingness to follow this advice, and that thereupon the defendant informed the said Martin that he was engaged in private practice in the Yeon Building, Portland, Oregon, and that if he, Martin, came to the decision that he did not wish to go to San Francisco or did not gain satisfaction from his brother's attorney that he, the defendant, would be glad to confer with Martin at his office in the Yeon Building and that he, the defendant, would do whatever he could to secure the release of the said wages. The defendant further alleges that at all times he was concerned in securing the release of

the said Martin's wages and to do everything in the said Martin's behalf that he could do and that thereupon the said Martin asked the said defendant what a private attorney would charge for doing the work and that the said defendant thereupon informed the said Martin that it would be impossible to tell him because it depended upon the amount of work that would be necessary to be done, but that the approximate legal fee that any private attorney would charge would be approximately One Hundred Seventy-five (\$175.00) Dollars and that the said Martin thereupon left the defendant's office and indicated that he was satisfied and would think it over and take such action as he deemed appropriate. Defendant alleges that he acted in good faith and did not believe that he could so represent the said Martin in securing the release of his funds at San Francisco in his official capacity as Assistant U. S. Attorney for the District of Oregon.

Answer to Sub-Paragraph (d).

Answering sub-paragraph (d) of Paragraph III of the Amended Complaint, defendant denies the allegation thereof, except as admitted, qualified, or alleged herein. Defendant admits that on December 7, 1945, and on January 4, 1946, respectively, he appeared in this Court as Assistant U. S. Attorney, representing the United States of America in two criminal proceedings brought by the said United States of America against Eugene Russell Costello, being numbers 16714 and 16715. Defendant further

admits that Milton R. Klepper appeared in said proceedings, representing the said Eugene Russell Costello, the defendant therein.

For further answer defendant alleges that on the dates aforesaid he was not associated as a partner or otherwise with Milton R. Klepper in the practice of law and that the only connection which he had at said times with the said Milton R. Klepper was that he, the defendant, shared office space in the same offices with the said Milton R. Klepper and that he did not share in any of the fees obtained by the said Milton R. Klepper in the practice of law or otherwise. Defendant further alleges that he fully informed the Court of the defendant's prior record and of all pertinent facts known to him related to the offenses with which the said defendant was charged as aforesaid and to which his pleas of guilty were entered. That in connection with said proceeding, the defendant's prior record was fully investigated by the U. S. Probation officers before sentences were imposed by the Court and the defendant made no recommendations, either for or against the defendant, nor were any misleading statements proffered to the Court by the defendant in such behalf. Defendant alleges that he acted with the utmost of good faith throughout and that he was not aware that he was breaching any propriety of ethics in such behalf. Reference is hereby made to that certain transcript of such proceedings prepared by the official court reporter of this Court, which said proceedings are by this

reference incorporated herein as though fully set forth and alleged.

Answer to Sub-Paragraph (e).

Answering sub-paragraph (e) of Paragraph III of the first Amended Complaint in disciplinary proceedings, denies each and every allegation, thing and matter therein contained, except as the same may be admitted, qualified or alleged herein.

This defendant alleges the true facts to be as follows: That he was associated with said Klepper and Brown in a law office in the Yeon Building, Portland, Oregon; that names appear upon the door thereof, Klepper, Brown & Patterson; that similar names appear upon stationery, including letter-heads, as used by those in said office; that a room was furnished this defendant and therefore this defendant appeared in court in any proceeding filed by said Klepper or Brown where he was requested to so appear, handling ex-parte matters, arguing motions and demurrers and assisting in the preparation for trial of every question; that said Klepper received one-half of any fees collected by this defendant; that an assumed business name was filed on or about October 2, 1946; that defendant had knowledge thereof.

That one of the objects and use of said name was to enable this defendant to appear in any proceeding without the necessity of having his name entered by motion as an attorney of record, and this defendant alleges that this inured to the benefit of the clients of said office and said lawyers involved;

that this defendant was never conscious of a violation of any of the Canons of Ethics of the American Bar Association or of the Oregon State Bar; that defendant always considered himself a quasi- or limited or special partner with said Klepper and said Brown by reason of the things herein stated; that no client or other attorney or court was ever imposed upon or misled by the defendant in respect to any of the things and matters set forth in subparagraph (e) or at all or in any manner; that this defendant was not familiar with the answers as made to certain questions pertaining to certain Canons of Ethics of the American Bar Association by a committee of the American Bar Association; that he has attempted to secure said answers and opinions with respect to certain Canons of Ethics as the same have been furnished him by a committee, but has been unable to find them in the State of Oregon subsequent to the year 1937; that defendant, therefore, alleges that there was no conscious, intentional or willful or assumed violation of any Canon of Ethics of the American Bar Association or of the Oregon Bar Association, and that if defendant erred, such error was one of misjudgment and not of mind, heart or conscience.

By way of general allegation in response to all of the charges mentioned in the Complaint herein, defendant alleges that he had been engaged in the practice of law as of the time of filing of such complaint for a total period of two and one-half years. That while engaged in private practice before entering the office of the United States Attorney and while engaged in the administration of his duties

as Assistant United States Attorney the defendant has always and without exception conducted his work in accordance with his understanding of the rules of ethics and canons of conduct applicable to such duties and responsibilities which he assumed. That if defendant erred in respect to any matters mentioned in the complaint, such error was one of misjudgment and not one of heart, mind or conscience.

Wherefore, defendant having fully answered plaintiff's Amended Complaint, prays that the same be dismissed.

/s/ B. A. GREEN,

Attorney for Defendant.

(Duly verified.)

[Endorsed]: Filed Dec. 17, 1947.

November 1947 Term

41st day, Friday, December 19, 1947.

Whereupon, the Secret Session of this court convened; present the Honorable James Alger Fee and the Honorable Claude McColloch, United States District Judges, Mr. Lowell Mundorff, Clerk, and Mr. Cloyd D. Rauch, Court Reporter.

The following proceedings were had before the Honorable James Alger Fee and the Honorable Claude McColloch, United States District Judges, to-wit:

[Title of Cause.]

Now at this day comes the plaintiff by Mr. James C. Dezendorf, of the Standing Committee on Discipline to the bar of this court and the respondent, J. Robert Patterson, in his own proper person

and by Mr. B. A. Green, his attorney. Whereupon, upon motion of respondent, through his attorney,

It Is Ordered that the title of this cause be amended to read: In re J. Robert Patterson; and

Whereupon, upon the Court's own motion,

It Is Further Ordered that Mr. Henry L. Hess, United States Attorney, be present during the trial of this proceeding; and

Whereupon, upon application of Mr. Henry L. Hess, United States Attorney,

It Is Ordered that Edward B. Twining, be, and he is hereby, granted permission to be present during the hearing and trial of this proceeding;

Whereupon, this cause comes on to be tried. Witnesses were sworn and testified, exhibits were admitted in evidence, and the parties having rested,

It Is Ordered that the respective parties hereto be, and are hereby, allowed to and including January 20, 1948, within which to submit their briefs herein; and,

It Is Further Ordered that this cause be, and is hereby continued for argument to Thursday, January 22, 1948.

In the District Court of the United States
for the District of Oregon

In Re J. Robert Patterson

To the Honorable James Alger Fee and Claude McColloch, Judges of the District Court of the United States, for the District of Oregon:

Each member of the Committee having read the transcript of testimony and the brief filed by J. Robert Patterson and in response to the Court's

request that the Committee submit a recommendation in this matter, David Lloyd Davies, Samuel H. Martin, R. A. Leedy and James C. Dezendorf, as the Standing Committee on Discipline to the Bar of this Court, recommend that J. Robert Patterson be permanently disbarred and that his name be stricken from the roll of attorneys entitled to practice in this Court.

Dated at Portland, Oregon, this 4th day of February, 1948.

/s/ DAVID LLOYD DAVIES,

/s/ SAMUEL H. MARTIN,

/s/ ROBERT A. LEEDY,

/s/ JAMES C. DEZENDORF,

Standing Committee on Discipline to the Bar of
this Court.

(Acknowledgment of Service.)

[Endorsed]: Filed Feb. 5, 1948.

[Title of District Court and Cause.]

OBJECTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW

J. Robert Patterson objects to Conclusions of Law numbered I, II, III, IV, V and VI appearing on pages 5 and 6 of the Findings of Fact and Conclusions of Law in their entirety, on the ground and for the reason that the said Findings of Fact do not substantiate or warrant or justify the said Conclusions of Law.

/s/ B. A. GREEN,

Attorney for J. Robert
Patterson.

[Endorsed]: Filed Nov. 16, 1948.

[Title of District Court and Cause.]

MOTION TO AMEND FINDINGS OF FACT

J. Robert Patterson moves that the Findings of Fact be amended in the following particulars:

I.

By striking the following phrase from Paragraph I of the Findings of Fact on page 2 of the Findings of Fact and Conclusions of Law and which is in the following words:

“This court was not aware of the relationship between Patterson and Klepper and between Patterson, Klepper and Brown until the same was brought to the attention of the court by the complaint in this proceeding.”

II.

By striking the following phrase from Paragraph V of the Findings of Fact on page 5 of the Findings of Fact and Conclusions of Law and which is in the following words:

“At the time of these occurrences the court was unaware of the relationship between Patterson and Klepper and”.

/s/ B. A. GREEN,

Attorney for J. Robert Patterson.

J. Robert Patterson contends that the evidence does not support or substantiate the Findings of Fact and the particulars as set forth herein.

/s/ B. A. GREEN,

Attorney for J. Robert Patterson.

[Endorsed]: Filed Nov. 16, 1948.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled matter came on regularly for hearing before the undersigned Judges of the above entitled Court on December 19, 1947. J. Robert Patterson appeared in person and by and through B. A. Green, one of his attorneys. The Standing Committee on Discipline to the Bar of this Court appeared by and through James C. Dezendorf. Evidence on behalf of the Committee and that offered by J. Robert Patterson was duly heard and received. After the close of the evidence, briefs on behalf of the Committee and J. Robert Patterson were duly filed. Thereafter the Committee served and filed its recommendation and the matter was finally submitted. Due consideration having been given to the record, the briefs, and the Committee's recommendation, and the Court being now fully advised, hereby makes and enters the following:

FINDINGS OF FACT

I.

J. Robert Patterson was admitted to practice before the courts of Oregon in September, 1941. In October, 1944, he became associated with Milton R. Klepper and moved into Klepper's suite of offices in the Yeon Building. On May 21, 1945, J. Robert Patterson accepted an appointment as Assistant United States District Attorney for the District of Oregon. J. Robert Patterson was admitted

to practice before this court on July 2, 1945. Under his contract of employment with the United States of America, Patterson was permitted to engage in such private practice of law as would not be inconsistent to his duties as Assistant United States Attorney. When Patterson first became associated with Klepper, he was given a drawing account of \$50.00 a week and all fees charged and collected by Patterson were divided equally between him and Klepper. Klepper paid all of the office overhead including rent, stenographer's salary, stationery, etc. After May 21, 1945, when Patterson became Assistant United States Attorney, he retained his office in Klepper's suite and their arrangement was continued the same as before except that the \$50.00 a week drawing account was discontinued. Commencing on or about October 2, 1946, Milton R. Klepper, McDannell Brown and J. Robert Patterson assumed the firm name of "Klepper, Brown & Patterson" and an assumed business name certificate covering the firm name was filed with the County Clerk of Multnomah County, Oregon. All of the matters related in paragraphs III, IV and VI of these findings occurred while Patterson held the office of Assistant United States Attorney and while he was engaged in private practice in association with Milton R. Klepper and McDannell Brown and after assumed name certificate covering the name of Klepper, Brown & Patterson had been filed with the County Clerk of Multnomah County. The matters related in paragraphs II and V of these findings occurred while Patterson held the

office of Assistant United States Attorney and while he was engaged in private practice in association with Milton R. Klepper but before any assumed name certificate had been filed in Multnomah County and before the parties were doing business under a firm name. This court was not aware of the relationship between Patterson and Klepper and between Patterson, Klepper and Brown until the same was brought to the attention of the court by the complaint in this proceeding.

II.

Marvin L. Hughes v. Alaska Steamship Company

Marvin L. Hughes, on August 8, 1945, was injured while a passenger on a vessel operated by the Alaska Steamship Company and owned by the United States of America. He consulted J. Robert Patterson in regard to his remedies and on October 8, 1945, J. Robert Patterson and Milton R. Klepper filed a complaint in this court against Alaska Steamship Company, Civil No. 2923. On November 5, 1945, the defendant Alaska Steamship Company filed an answer in said action which said answer asserted a further and separate defense in the following language:

“For a further separate answer and defense defendant alleges that at none of the times alleged in the complaint was defendant the owner of said SS “Yukon,” nor in the sole control of said ship, nor at any of said times was defendant managing or operating said ship, except in a very limited sense, to wit, it was attending to the business of said vessel under

the terms and conditions of a certain agreement between it and the United States of America, represented by the United States of America, represented by the War Shipping Administration, and not otherwise, and said agreement is well known in the steamship business as GAA42, and has been published in the Federal Register and will be adduced at the trial of this cause."

At the time that said Marvin L. Hughes consulted Patterson it was well known to lawyers that there was a serious question as to whether or not persons having claims for damages of the nature of Hughes' claim could bring an action against the steamship companies operating or conducting the business of the ship or whether the remedy in such cases was by action against the United States under the Suits in Admiralty Act and Patterson either knew or should have known of such question and that after the filing of the answer in the Hughes case Patterson did know of such question. Patterson was not in a position to represent Hughes in an action against the United States and by reason of his position as Assistant United States Attorney he was not in a position to give Hughes disinterested advice as to whether he should institute an action against the Alaska Steamship Company or against the United States. Patterson did not discuss with Hughes the existence of a conflict between his duties as Assistant United States Attorney and his duties as attorney for Hughes. Patterson thought he was protecting the United States of America. (Transcript of Testimony Page 51.)

III.

State of Oregon v. Westley Bowden

J. Robert Patterson, while Assistant United States Attorney and while actively performing his duties as such, acted as attorney for J. Westley Bowden in a criminal action instituted in the Circuit Court of the State of Oregon for the County of Multnomah in which Bowden was charged with the crime of murder in the first degree, and in the course of such representation of Bowden as his attorney, Patterson frequently consulted with and counseled with said Bowden; made arrangements with Edwin D. Hicks for Hicks to act as chief counsel for Bowden; appeared in court as one of defendant's counsel throughout the trial; cross-examined one witness and accepted a fee for his services. The trial was of a sensational nature and was given wide publicity. The Attorney General's manual governing the conduct of United States Attorneys provides:

“In the interest of cooperation between the two prosecuting agencies, and for other obvious reasons, assistant U. S. Attys. should not accept employment to defend persons charged with a crime in a state court.”

IV.

Joseph Martin Matter

Joseph Martin, a parolee, was referred to Patterson in his capacity as Assistant United States Attorney in connection with Martin's desire to procure the release of certain funds deposited in the registry of the United States District Court at San

Francisco. Patterson advised Martin as to the method of procuring the release of the funds involved and invited Martin to consult him at his private office in the Yeon Building, and Patterson advised Martin that the estimated fee for handling the matter was \$175.00.

V.

United States of America v. Eugene Russell Costello (2 cases)

In October, 1945, J. Robert Patterson presented the facts regarding certain violations of the criminal laws of the United States by Eugene Russell Costello to the Grand Jury of the United States which, on October 17, 1945, returned two indictments respectively which said indictments were signed by the foreman of the Grand Jury and by J. Robert Patterson, Assistant United States Attorney. Thereafter, an aunt of Eugene Russell Costello discussed with Patterson the selection of an attorney to represent Costello and Patterson gave her Klepper's name as one of several attorneys that Costello might retain. Thereafter, Costello retained Klepper as one of his attorneys and notwithstanding the relationship and association between Patterson and Klepper (as set out in paragraphs I and VI hereof) Patterson continued to present the case on behalf of the United States and appeared before the Court at the time that Costello was arranged and plead guilty and again at the time that Costello was sentenced. Patterson also prepared the order directing that the money deposited as bail be returned to Costello. At the time of these occurrences

the court was unaware of the relationship between Patterson and Klepper and Patterson failed to disclose the relationship to the court.

VI.

Practicing Law as a Partner

Commencing October 2, 1946, J. Robert Patterson, McDannell Brown and Milton R. Klepper were engaged in the private practice of law in the Yeon Building in Portland, Oregon, and on the door of their suite of offices appeared the following: "Klepper, Brown & Patterson, Attorneys at Law. Milton R. Klepper, McDannell Brown, J. Robert Patterson" the stationery they used was headed as follows:

"Klepper, Brown & Patterson
Law Offices
522 Southwest Fifth Avenue
Portland 4, Oregon

Milton R. Klepper,
McDannell Brown,
J. Robert Patterson Telephone ATwater 9474"
the letters which Patterson wrote on this stationery were signed:

"Klepper, Brown & Patterson
By J. Robert Patterson",

the pleading paper used by them contained the following on the lower left hand corner:

"Klepper, Brown & Patterson
Attorneys at Law
Yeon Building
Portland 4, Oregon"

and the professional card used by Mr. Patterson was:

“J. Robert Patterson ATwater 9474
Klepper, Brown & Patterson Yeon Building
Attorneys at Law Portland 4, Oregon”

VII.

The Standing Committee on Discipline to the Bar of this Court has made a recommendation that J. Robert Patterson be permanently disbarred and that his name be stricken from the roll of attorneys entitled to practice in this court.

Based upon the foregoing findings of fact, the court hereby makes and enters the following:

CONCLUSIONS OF LAW

I.

The relationship between Milton R. Klepper and J. Robert Patterson at all times mentioned in these Findings and Conclusions was such that it was improper for them to appear on opposite sides of any action.

II.

The duties of Patterson as Assistant United States Attorney and as a member of the bar of this court were such that it was improper for him to advise Marvin L. Hughes as to his respective rights and choice of remedies as between the Alaska Steamship Company and the United States of America.

III.

The duties of J. Robert Patterson as Assistant United States Attorney and as a member of the

bar of this court, were such that it was improper for Patterson to offer to act as private counsel for Joseph Martin. It was also improper for Patterson to solicit private law business from a man on parole.

IV.

The duties of J. Robert Patterson as Assistant United States Attorney and as a member of the bar of this court, were such that it was improper for him to represent J. Westley Bowden in defending a charge of murder in the Circuit Court of the State of Oregon for the County of Multnomah.

V.

The duties of J. Robert Patterson as Assistant United States Attorney and as a member of the bar of this court, were such that it was highly improper for him to suggest to Eugene Russell Costello, either directly or indirectly, the name of any attorney to represent him and particularly to suggest the name of Milton R. Klepper in view of the relationship and association between Patterson and Klepper; and it was further highly improper for Patterson to continue to present the said cases to the court on behalf of the United States after the said Costello had retained Milton R. Klepper as his attorney.

VI.

J. Robert Patterson has so flagrantly disregarded the rules governing the professional conduct of lawyers that the recommendation of the Standing Committee on Discipline should be accepted and ap-

proved, and J. Robert Patterson should be permanently disbarred and his name should be stricken from the roll of attorneys entitled to practice in this court.

Dated at Portland, Oregon, this 24th day of January, 1949.

/s/ JAMES ALGER FEE,
United States District Judge.

/s/ CLAUDE McCOLLOCH,
United States District Judge.

[Endorsed]: Filed Jan. 24, 1949.

In the District Court of the United States
for the District of Oregon

D-3

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. ROBERT PATTERSON,

Defendant.

JUDGMENT

Based upon the Findings of Fact and Conclusions of Law heretofore entered herein, and the Court being fully advised it is hereby

Ordered, adjudged and decreed that the recommendation of the Standing Committee on Discipline to the Bar of this Court be and the same hereby is accepted and approved, and it is further

Ordered, adjudged and decreed that J. Robert Patterson be permanently disbarred and that his

name be stricken from the roll of attorneys entitled to practice in this court.

Dated at Portland, Oregon, this 24th day of January, 1949.

/s/ CLAUDE McCOLLOCH,
District Judge.

[Endorsed]: Filed Jan. 24, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: The Standing Committee on Discipline to the
Bar of the Above-entitled Court:

You and each of you will please take notice that J. Robert Patterson appeals to the Ninth Circuit Court of Appeals from that certain judgment in the above entitled action, made and entered the 24th day of January, 1949, by the Honorable James A. Fee and the Honorable Claude McCulloch, Judges of the above entitled Court, wherein it was ordered, adjudged and decreed that the recommendation of the Standing Committee on Discipline to the Bar of this Court be accepted and approved, and it was further ordered, adjudged and decreed that J. Robert Patterson be permanently disbarred and that his name be stricken from the roll of attorneys entitled to practice in this Court.

Dated this 24th day of January, 1949.

/s/B. A. GREEN,

Attorney for J. Robert Patterson.

(Acknowledgment of Service.)

[Endorsed]: Filed Jan. 24, 1949.

[Title of District Court and Cause.]

BOND ON APPEAL

Whereas, the Respondent, J. Robert Patterson in the above entitled action appeals to the United States Court of Appeals for the Ninth Circuit, from a judgment made and entered against the Respondent in the said action in the United States District Court for the District of Oregon on the 24th day of January A. D. 1949.

Now, therefore, in consideration of the premises, and of such appeal, the undersigned, the United States Fidelity and Guaranty Company, of Baltimore, Maryland, a corporation organized and existing under the laws of the State of Maryland, and authorized and empowered under the laws of the State of Oregon to become surety upon bonds, undertakings, etc., in the State of Oregon, does hereby jointly and severally undertake and promise, on the part of the appellant, that the said appellant will pay all costs and disbursements which may be awarded against him on the appeal not to exceed Two Hundred Fifty Dollars (\$250.00). But this understanding does not stay the proceedings in this cause.

(Seal) UNITED STATES FIDELITY AND
GUARANTY COMPANY.

By /s/ CECIL R. ALEXANDER,
Attorney-in-Fact.

Countersigned:

By /s/ PAUL F. NOLAN,
Resident Agent for State of Oregon.

(Acknowledgment of Service.)

[Endorsed]: Filed Jan. 26, 1949.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

The appellant respectfully submits the following statement of points on which the appellant intends to rely on appeal:

I.

The District Court erred in entering its Findings of Fact and Conclusions of Law and Judgment of Permanent Disbarrment against the appellant, for the reason that the evidence is insufficient to justify or support the said Findings of Fact, Conclusions of Law and the Judgment.

/s/B. A. GREEN,

Attorney for Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed Jan. 27, 1949.

[Title of District Court and Cause.]

ORDER TO FORWARD EXHIBITS

This matter coming on before the undersigned Judge of the above entitled Court on the motion of the appellant for an order directing the Clerk to forward all of the exhibits received in the above entitled cause to the Ninth Circuit Court of Appeals, it appearing that the appellant has filed Notice of Appeal to the Circuit Court of Appeals for the Ninth Circuit; the Court being fully advised;

It is therefore ordered that the Clerk of the above entitled Court be and he is hereby directed to forward to Paul P. O'Brien, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit all of the exhibits received in the above entitled cause.

Dated this 29th day of January, 1949.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed Jan. 29, 1949.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

To the Clerk of the District Court of the United States for the District of Oregon:

The appellant designates the following as the record to be forwarded to the United States Court of Appeals for the Ninth Circuit in the appeal of the above entitled cause, it being the appellant's intention to designate the whole and entire record:

1. The first amended complaint.
2. Answer to first amended complaint.
3. Order changing title of case.
4. Recommendation of Standing Committee.
5. Findings of Fact and Conclusions of Law.
6. Motion to amend findings of fact.
7. Objections to Findings of Fact and Conclusions of Law.
8. Opinion.
9. Judgment.
10. Notice of appeal.
11. Bond for costs on appeal.
12. Statement of points on appeal.
13. Designation of record.
14. Order to forward exhibits.
15. Transcript of the following proceedings:
December 19, 1947; June 28, 1948; July 30, 1948;
January 24, 1949.

/s/B. A. GREEN,

Attorney for Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed Jan. 27, 1949.

[Title of District Court and Cause.]

DOCKET ENTRIES

1947

Mar. 7—Filed report of Chairman Dezendorf.

Mar. 12—Filed complaint in disciplinary proceedings.

Mar. 17—Filed return of service by Marshal.

Apr. 2—Filed motion of J. Robert Patterson.

Apr. 16—Filed Amended Complaint in Disciplinary Proceedings.

May 9—Filed Answer.

July 1—Record of Hearing of Application for trial date.

Dec. 4—Filed First Amended Complaint in Disciplinary Proceedings.

Dec. 17—Filed Answer.

Dec. 19—Record of Trial. Entered Order that Henry Hess U. S. Attorney be present; granted application of Henry Hess that E. B. Twining, Asst. U. S. Atty. be permitted to be present. Evidence adduced. Entered order that briefs be submitted by Jan. 20, 1948 and setting case for argument on January 22, 1948. Entered order changing title of case to "In Re J. Robert Patterson."

Dec. 19—Filed Trial Brief of Standing Committee on Discipline.

1948.

Jan. 20—Filed copy of Trial Brief of Standing Committee on Discipline.

1948

- Jan. 20—Filed Brief, with copy, of Standing Committee on Discipline.
- Jan. 20—Filed Respondent's Brief with copy.
- Jan. 22—Record of further hearing. Entered order of reference to Standing Committee on Discipline for recommendation.
- Feb. 5—Filed Recommendation of Standing Committee on Discipline.
- June 28—Record of further hearing; brief statement by B. A. Green. Entered order directing Standing Committee on Discipline to prepare findings of fact, conclusions of law and order of disbarment.
- July 2—Lodged proposed "Findings of Facts and Conclusions of Law."
- July 9—Filed motion to Amend Proposed Findings.
- July 9—Filed objections to Findings and Conclusions.
- July 30—Record of Hearing on Objections to Findings and on Motion to Amend Findings.
- Aug. 11—Filed Transcript of Proceedings of December 19, 1947, June 28, 1948 and July 30, 1948.
- Aug. 21—Filed Copy of Transcript of Proceedings of July 30, 1948.
- Aug. 21—Lodged second proposed "Findings of Fact and Conclusions of Law."
- Aug. 27—Filed Motion to Amend proposed Findings of Fact.
- Aug. 27—Filed objections to Findings of Fact and Conclusions of Law.

1948

Nov. 8—Lodged third proposed “Findings of Fact and Conclusions of Law.”

Nov. 16—Filed Motion to Amend Findings of Fact.

Nov. 16—Filed objections to Findings of Fact and Conclusions of Law.

1949

Jan. 24—Record of further hearing. Entered order denying motion to Amend Findings of Fact and Order Overruling objections to Findings of Fact and Conclusions of Law.

Jan. 24—Filed and entered Findings of Fact and Conclusions of Law (signed by Fee and McColloch).

Jan. 24—Filed and entered Judgment of Disbarment.

Jan. 24—Filed notice of appeal.

Jan. 26—Filed bond for costs on appeal.

Jan. 27—Filed statement of points on appeal.

Jan. 27—Filed designation of record on appeal.

Jan. 29—Filed order to forward original exhibits.

United States of America,
District of Oregon—ss.

CERTIFICATE OF CLERK

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing documents consisting of First Amended Complaint, Answer of J. Robert Patterson, Order to amend title, Recommendation of Standing Committee, Objections to

Findings of Fact and Conclusions of Law, Motion to Amend Findings of Fact and Conclusions of Law, Findings of Fact and Conclusions of Law, Judgment of Disbarment, Notice of Appeal, Bond on Appeal, Statement of Points on Appeal, Order to forward Exhibits, Designation of Record on Appeal, Transcript of Docket Entries, and Clerk's certificate, constitute the record on appeal from a judgment of said court in a cause therein numbered D-3, In re J. Robert Patterson, the said J. Robert Patterson being the appellant; that the record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, with the exception of the opinion which was not filed in this case, and in accordance with the rules of this court and the Court of Appeals.

I further certify that the costs of this appeal, \$5.00, has been paid by the appellant.

I further certify that there is enclosed with this record on appeal Exhibits Nos. 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, transcript of testimony dated December 19, 1947, June 28, 1948, and July 30, 1948, also transcript of proceedings dated January 24, 1949.

In testimony whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 3rd day of February, 1949.

(Seal)

LOWELL MUNDORFF,
Clerk.

In the District Court of the United States for the
District of Oregon

In re: J. Robert Patterson

Before: Honorable James Alger Fee, Judge; Honorable Claude McColloch, Judge.

Appearances: Mr. James Dezendorf, Attorney and member of the Standing Committee on Discipline to the Bar of the District Court of the United States for the District of Oregon, appearing on behalf of said Committee; Mr. J. Robert Patterson, in person and by Mr. B. A. Green, his attorney.

Court Reporter: Cloyd D. Rauch.
Portland, Oregon, Friday, December 19, 1947 a.m.

PROCEEDINGS:

Mr. Dezendorf: May it please the Court, this is a disbarment matter involving Mr. J. Robert Patterson. Mr. Green advised me, two days ago, that there is some question in his mind as to the propriety of the United States being plaintiff. [1*] He also furnished me with a brief which raises the question as to whether the United States of America may appear except by the Attorney General. In checking the authorities I find that the practice in this District has always been to have the United States of America as plaintiff, whereas in most cases the United States Attorney has been the attorney in the case. In checking the authorities generally I find that the cases are pretty well divided

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

between those in which the United States of America is the plaintiff and those where the case is merely entitled in re the person who is involved. There is a rather interesting case on the subject, decided by the Circuit Court of Appeals for this Circuit, which is the United States vs. Hicks, in which it is indicated that perhaps the United States should be the party, although the titling of the case merely in re the person involved is also approved. That is the case reported in 37 Fed. (2d) at page 289.

Mr. Green also informed me that he would make no objection to proceeding at this time, in any event, but that he would prefer to have the case merely entitled "In re J. Robert Patterson"—is that correct, Mr. Green?

Mr. Green: That is correct, but I would like to make a statement to the Court as to my reasons. My basic reason for raising the question with Mr. Dezendorf was the fact that I don't think this Committee has any authority to represent the sovereign power. I find nothing in the statute giving this [2] Court the power to appoint a committee whereby they could come in and represent the United States of America, and so I raised the question with Mr. Dezendorf, which convinced me that it is wrongfully entitled and that it should be entitled "In re Patterson," and I told Mr. Dezendorf that we would have no objection to changing that at this time and we would proceed immediately, but that I would withhold filing any motion to dismiss if the matter was changed in that manner. I simply want to state again to the Court that I don't think

anybody can represent the sovereign power without some statutory authority, and I have not been able to find it.

The Court (Fee, J.): Well, I will give you my idea. This court represents the sovereign power, though I have no hesitation about saying to you that I will let you change the title. I don't care how it is titled. This is a trial by the Court, in the name of the sovereign power, of one of its attorneys, and I have no feeling at all that the title should not be changed and I will direct it to be changed.

Mr. Green: All right, I admit I raise no objection, your Honor. I recognize that your Honor represents the sovereign power and the proceeding is not brought in the name of Judge Fee and Judge McColloch.

The Court (Fee, J.): That isn't my idea. I think the Court has the right to entitle it in that way, being a proceeding by the Court with reference to one of its attorneys, but if there is any objection to proceeding in that way I shall direct that the [3] proceeding be changed to an "In re" proceeding and the title to be carried on in that way.

Mr. Dezendorf: If the Court please, the issues are made up by the First Amended Complaint and the Answer which has been filed to it. The substance of the complaint has, generally speaking, been admitted. The first charge, which is paragraph III (a), is:

"That on October 8, 1945 he"—J. Robert Patterson—"filed a complaint in this court on behalf of Marvin L. Hughes, Plaintiff, vs. Alaska Steamship Company, a corporation, Defendant, Civil No. 2923,

and thereafter prosecuted said cause to a conclusion, although he well knew that one of the principal defenses that would be urged by the Defendant was that the Plaintiff's claim, if any, should be asserted against the United States of America, whom he was not in a position to sue because of his office as Assistant United States Attorney."

That is admitted in the answer. However, at this time I think it might be advisable to offer the record in that case, and I think the Court has it.

The Court (Fee, J.): Just before you proceed, Mr. Dezendorf, I note the absence of the United States Attorney's office. Mr. Mundorff, will you call up the United States Attorney, Mr. Hess, and tell him to come into court, that I so direct.

(A short recess was had, following which proceedings were resumed, as follows:) [4]

(The appearance of Honorable Henry L. Hess, United States Attorney, is noted.)

The Court (Fee, J.): Mr. Hess, the Court has directed you to come in and sit in in this proceeding, not in any formal character, but the title of the case has now been changed from the United States against Patterson to the title of "In re Patterson."

Mr. Hess: Yes, your Honor.

The Court (Fee, J.): And the Court, however, directs that you sit through the proceeding.

Mr. Hess: Would your Honor have any objection to Mr. Twining sitting through with me in the case?

The Court (Fee, J.): Sitting with you?

Mr. Hess: Yes.

The Court (Fee, J.): I have no objection to his sitting with you.

Mr. Hess: I wonder if Mr. Mundorff—I think Mr. Twining was expecting to be here this morning but I wonder if Mr. Mundorff will let him know?

The Court (Fee, J.): Yes, I will so direct.

Mr. Hess: Thank you.

The Court (Fee, J.): I won't substitute Mr. Twining for you.

Mr. Hess: How is that?

The Court (Fee, J.): I won't substitute Mr. Twining for [5] you.

Mr. Hess: Yes, I understand that, your Honor.

Mr. Green: I don't know of any rules, I haven't been able to find any rules, under which this is being conducted. This is an informal proceeding, yet very formal. We expect to call Mr. Twining as a witness in the matter, and I understand from inquiry that the Court sometimes excluded all witnesses.

The Court (Fee, J.): Yes, that is true.

Mr. Green: And that is the reason I am calling it to the Court's attention.

The Court (Fee, J.): No, that is all right; I will be very glad to have Mr. Twining sit in and testify if he wants to.

Mr. Green: And without waiving our right to call him.

Mr. Hess: You have no objection?

Mr. Green: None whatever. I simply wanted to call that to the Court's attention.

The Court (Fee, J.): All right, you may proceed without waiting for Mr. Twining.

(Mr. Edward B. Twining, Assistant United States Attorney, thereafter appeared and sat at counsel table throughout the proceeding, except when testifying.)

Mr. Green: Before proceeding, I understand Mr. Dezendorf is wanting to introduce a record in the files, and I just want to inquire,—I make my objection in the normal manner and save [6] my exception in the normal manner, is that correct?

The Court (Fee, J.): These proceedings are somewhat *sui generis*, Mr. Green. I don't know any particular rule to be followed, and, as a matter of fact, the Court, I think, has the power, without trial, if the Court were satisfied, to strike the name of an attorney from the roll. At least, I have always assumed that the Court has that power, if the Court were satisfied of the situation without hearing, but I will accord you any method that you desire to proceed, any way that you want to protect any rights that Mr. Patterson may have.

Mr. Green: All right, thank you. Then the other thing I want to mention before the testimony proceeds, Mr. Dezendorf made the statement that we had admitted all the charges in the Complaint. Now, I think that the Answer does not bear that out completely, but I would not want that statement made of record, because there have been no opening statements called for here, and I would not want the record to show that, that we have admitted all charges in the Complaint. We have denied and then we have made certain allegations in our Answer as to substantial facts, and my only purpose in calling attention to this in the record at this time is that

it shall not be charged that we have agreed to everything Mr. Dezendorf has said.

The Court (McColloch, J.): Have you filed a reply, Mr. Dezendorf?

Mr. Dezendorf: We have not filed a reply. [7]

The Court (McColloch, J.): What is your position as to that?

Mr. Dezendorf: We do not feel that we are required—we are prepared to admit most of the affirmative allegations of the Answer.

The Court (McColloch, J.): However, in not replying, you do not consider that you are admitting by virtue of that?

Mr. Dezendorf: No.

The Court (McColloch, J.): You probably have in mind that in normal pleadings a reply not necessary.

Mr. Dezendorf: That is right.

The Court (Fee, J.): In order that there be no difficulty about that, the Court will, if there is no objection, treat it as though there was a reply filed to the general denial.

Mr. Green: We will have no objection.

The Court (Fee, J.): All right.

Mr. Dezendorf: The second charge is, "That on or about the 30th day of August, 1946, he accepted employment by one Westley Bowden, who was charged in the Circuit Court of the State of Oregon, for Multnomah County, with the crime of murder, and he represented said Westley Bowden at the trial and accepted a fee therefor although he expected to be called as a witness at the trial of said Westley Bowden and although the Attorney General's manual governing the con-

duct of United States Attorneys directs that United States Attorneys shall not [8] represent a person charged with a crime in a State Court.”

The allegations of the Answer in this regard are in the nature of admissions, and I refer now to page 2 and will read it, as follows:

“Defendant admits that on or about the 30th day of August, 1946, he accepted employment by one, James Westley Bowden, who had theretofore been charged in the Circuit Court of the State of Oregon, County of Multnomah, with the crime of murder. Defendant further admits that he served in a nominal capacity as co-counsel in behalf of said Westley Bowden at the trial and accepted a fee therefor, although he expected to be called as a witness at the trial. Defendant further admits that the Attorney General’s manual governing the conduct of U. S. Attorneys provides as follows:

“‘In the interest of cooperation between the two prosecuting agencies, and for other obvious reasons, assistant U. S. Attys. should not accept employment to defend persons charged with a crime in a state court.’”

The rest of the Answer with regard to that charge is in the nature of an allegation, as distinguished from an admission.

(At this point Mr. Edward B. Twining, Assistant United States Attorney, entered the room.)

The Court (Fee, J.): I understand that there has been an Amended Answer. Are you read-

ing from the original Answer or the Amended Answer? [9]

Mr. Dezendorf: I thought I was reading from the Amended Answer. Perhaps I am not. Yes, this is the Amended Answer, filed on the 17th of December.

The Court (Fee, J.): On the 17th. It is not so entitled. I just wanted to be sure.

Mr. Dezendorf: Yes, I am referring to the Amended Answer.

The Court (Fee, J.): In order that the record be straight, we are proceeding upon the First Amended Complaint, filed December 4, 1947, and the Answer, not entitled as an Amended Answer, but the Answer entitled as an Answer to the Amended Complaint, filed December 17, 1947.

Mr. Green: That is correct.

The Court (Fee, J.): Now that the Clerk is back, I would like to have that file No. 2923 marked as an exhibit.

(Said file, containing pleadings, exhibits and other documents in cause entitled, in the District Court of the United States for the District of Oregon, Marvin L. Hughes, plaintiff, vs. Alaska Steamship Company, a corporation, defendant, Civil No. 2923, was thereupon marked for identification as Exhibit 2.)

Mr. Dezendorf: I offer in evidence the Exhibit No. 2.

Mr. Green: May I inquire, this is the complete judgment role in the Hughes case, is that correct?

Mr. Dezendorf: That is my understanding. [10]

Mr. Green: I haven't any objection.

The Court (Fee, J.): Admitted. It may be marked later.

(Said file, so offered and received, having previously been marked for identification, was thereupon marked received as Exhibit 2.)

Mr. Dezendorf: In view of Mr. Green's statement with regard to his Answer, I wish to go back now to the first charge, which has to do with the Hughes case which has just been received, and note that his Amended Answer is as follows, on page 1:

"Defendant admits that on the 8th day of October, 1945, he, as co-counsel with Milton R. Klepper, filed a complaint in this Court on behalf of one Marvin L. Hughes as plaintiff and against Alaska Steamship Company, a corporation, defendant, Civil No. 2923, and that thereafter said cause was prosecuted to a conclusion. Defendant further admits that he knew that one of the defenses which would be urged by said defendant corporation was that plaintiff's claim, if any, should be asserted against the United States of America. Defendant admits that by virtue of his employment as Assistant United States Attorney, he would have been without authorization to bring a suit against the United States of America."

The rest of it is in the form of an allegation. The third charge, on page 2, is:

"That on or about February 12, 1947, he of-

ferred to represent one Joseph Martin for a fee in connection with [11] proceedings to procure the release of certain wages earned by the said Joseph Martin which were deposited in the registry of the United States District Court at San Francisco, California, although said Joseph Martin was referred to him in his capacity as Assistant United States Attorney and such matters are customarily handled by United States Attorneys without compensation therefor.”

The Amended Answer admits only with regard to the said charge that on the 12th day of February, 1947, Joseph Martin was referred to him in his capacity as Assistant United States Attorney. There are other admissions, but they do not exactly meet the charge. Perhaps it would be well to read them now, from page 4 of the Amended Answer:

“Defendant admits that on or about February 12, 1947, one Joseph Martin was referred to defendant in his capacity as Assistant U. S. Attorney in connection with proceedings to procure the release of certain wages theretofore allegedly earned by the said Joseph Martin and which had theretofore been allegedly deposited in the registry of the U. S. District Court at San Francisco, California. Defendant alleges that at the time said Joseph Martin was referred to defendant”—well, that is in the form of allegations, so I don’t think we need to go any further on that.

The next charge, on page 2 of the Complaint, is:

“That on December 7, 1945, and on January 4, 1946, [12] he appeared in this Court as Assistant

United States Attorney, representing the United States of America in two criminal proceedings brought by the said United States of America against Eugene Russell Costello, being numbers 16714 and 16715, although he was then associated in the practice of law with Milton R. Klepper, who appeared in said proceedings representing the said Eugene Russell Costello, the Defendant therein."

The Answer admits everything except this language, "although he was then associated in the practice of law with".

In that connection, I would like to offer in evidence, at this time, the files bearing numbers 16714 and 16715.

(File bearing pleadings and other documents in cause entitled, in the District Court of the United States for the District of Oregon, United States of America, plaintiff, vs. Eugene Russell Costello, Defendant, No. 16714, and bearing Judgment Roll No. 24887, was thereupon marked for identification as Exhibit 3; and

(File bearing pleadings and other documents in cause entitled, in the District Court of the United States for the District of Oregon, United States of America, plaintiff, vs. Eugene Russell Costello, Defendant, No. 16715, and bearing Judgment Roll No. 24888, was thereupon marked for identification as Exhibit 4.) [13]

Mr. Green: If I may inquire from the Clerk, is this the complete roll in respect to the Costello case?

The Clerk: I believe so.

Mr. Green: Or from Mr. Dezendorf, either. I haven't any objection if it is not the complete roll,—I haven't examined them—but if they tell me it is the complete roll that is all I want to know, I haven't any objection.

Mr. Dezendorf: That is my understanding, that they are the complete rolls, from the Clerk.

The Court (Fee, J.): They will be admitted without objection, and if they are not complete rolls we will see that they are completed.

(The two files referred to, so offered and received, having previously been marked for identification, were thereupon marked received as Exhibits 3 and 4.)

Mr. Dezendorf: "That commencing on or about October 2, 1946, he represented that he was and held himself out as practicing law as a member of a partnership composed of Milton R. Klepper, McDannell Brown and himself, although he was not then and is not now a partner with Milton R. Klepper and McDannell Brown or with either of them."

With regard to this charge there is no admission in the Answer, although there are certain allegations there.

May I have these marked by the reporter as the next [14] exhibit.

(The documents referred to were thereupon marked for identification as Exhibit 5.)

Mr. Dezendorf: Will you hand it to Mr. Green. I offer that in evidence. It is for the purpose

of showing the letterhead on the letters and the billing.

Mr. Green: What is the object of this? That they use the letterhead of Klepper, Brown & Patterson?

Mr. Dezendorf: Klepper, Brown and Patterson.

Mr. Green: Klepper, Brown and Patterson.

Mr. Dezendorf: Letterhead and billhead.

Mr. Green: Letterhead and billhead. We admit that, your Honor.

Mr. Dezendorf: You allege it. You do not admit it.

Mr. Green: Well, I understand an attorney's allegation is an affirmative fact and that constitutes an admission of that particular thing.

The Court (Fee, J.): Is that your only objection?

Mr. Green: Well, my other objection to it, your Honor, is this, that these documents submitted to me are matters that came to the office of Hampson, Koerner, Young & Swett in matters relating to personal things in litigation between Klepper and the office with which Mr. Dezendorf is associated. Now, I think they have no relation or bearing upon this case, except that the letterheads bear the names of Klepper, Brown [15] and Patterson, but I see no reason why Mr. Dezendorf should be able to go into his files in personal matters and bring up personal things that have no relationship to any charge, and I don't think he has any right to bring up to Mr. Patterson any personal dealings with their office. I don't think it is proper. We admit in our answer that

they used the letterheads of Klepper, Brown & Patterson. I see no reason why an attorney that has come into possession of certain documents in matters in litigation between the two should bring those matters out before a court.

The Court (Fee, J.): Well, there is this about it, that it does show that there was a course of business. Now, the mere fact that the names might be used on letterheads and billheads might not mean much, but that it was used in the course of certain business, transaction of certain business, between certain firms in town, I don't care whether it was Mr. Dezendorf's firm or some other firm.

Mr. Green: Your Honor, we admit it was used on letterheads, billheads, and it is on the door, an assumed name was filed. We admit all that.

Mr. Dezendorf: It isn't admitted in the answer. It is set up in the form of an allegation.

Mr. Green: Well, I don't get the distinction between an affirmative allegation on our part—we are bound by it, is my understanding of the pleading, and we allege it and we state [16] it very firmly and very positively. Now, my only objection to this is that it is taking facts and things of a personal nature that came to them in that relationship and they bring it in here and it has no bearing in this case at all, and everything included in it we admit.

The Court (Fee, J.): All right, the Court will exclude it, and, based upon that, I take it that there is an admission there, that you admit the charge in that connection?

Mr. Green: Now, we admit that we used that name, but we are certainly not admitting that there is anything unethical or violating any kind of ethics in doing so.

The Court (Fee, J.): No, I am not trying to trap you. I am not asking you for any admission beyond what you have set out affirmatively, but I want this as an admission so far of the charge.

Mr. Green: Yes, we do.

Mr. Dezendorf: I also have files of this Court Nos. 3170, 3665, 3511,—

Mr. Green: Is that 3511?

Mr. Dezendorf: Right,—3651, 3658, which I will offer for the purpose of showing that the firm or the designation “Klepper, Brown & Patterson” appears on the pleadings in each of those cases.

Mr. Green: I want the Court to know that, while I haven't seen the files at all, but I am just assuming that Mr. Dezendorf's statement is correct that it does bear the name of Klepper, [17] Brown & Patterson, and, Mr. Dezendorf saying that is true, I have no objection to admitting the files, because we frankly admit that there are files in the Circuit Court of Multnomah County and in other courts bearing that name on legal documents. There is no question about that at all. We admit that in our Answer.

The Court (Fee, J.): In view of the fact that

these are public records, the Court will admit them.

Mr. Green: We may have time to look at them?

The Court (Fee, J.): Yes, surely.

Mr. Green: Well, I guess we might do that later on. We will do that later, your Honor. We haven't any objection.

The Court (Fee, J.): They may be marked later—or you can mark them now, if you will.

(The files referred to, so offered and received, were thereupon marked as follows:

(File containing pleadings and documents, in the District Court of the United States for the District of Oregon, Albert C. Odem, et al., Plaintiffs, vs. Underwriters at Lloyd's, London, Defendants, No. Civil 3170, bearing Judgment Roll No. 25381, was marked received as Exhibit 6;

(File containing pleadings and documents, in the District Court of the United States for the [18] District of Oregon, Allen Lamb, Administrator of the Estate of Isadore Allen Lamb, Deceased, Plaintiff, vs. New York Casualty Company, a corporation, Defendant, No. Civil 3651, was marked received as Exhibit 7;

(File containing pleadings and various documents, in the District Court of the United States for the District of Oregon, entitled Alberta D. Williamson, Administratrix of the Estate of Gilbert D. Williamson, Deceased, Plaintiff, vs. Southern Pacific Company, a corporation, Defendant, Civil No. 3665, bearing Judgment Roll No. 25830, was marked received as Exhibit 8;

(File containing pleadings and other documents, in the District Court of the United States for the District of Oregon, entitled Anna V. Ritch, Plaintiff, vs. Union Pacific Railroad Co., a corporation, Defendant, No. Civil 3658, was marked received as Exhibit 9; and

(File containing pleadings and other documents, in the District Court of the United States for the District of Oregon, entitled Evelyn N. Robbins, Plaintiff, vs. Frank P. Busch, Defendant, No. Civil 3511, bearing Judgment Roll No. 25702, [19] was marked received as Exhibit 10.)

Mr. Dezendorf: May I have this marked as Exhibit 11.

(Photostatic copy of check, drawn on Main Branch, The First National Bank of Portland, No. 2448, April 28, 1947 Klepper, Brown & Patterson to Clerk, U. S. District Court, in the amount of \$15.00, so produced, was thereupon marked for identification as Exhibit 11.)

Mr. Green: There is no objection.

Mr. Dezendorf: That is number 11.

The Court (Fee, J.): Admitted.

(Said photostatic copy of check, so offered and received, having previously been marked for identification, was thereupon marked received as Exhibit 11.)

(Certified photostatic copy of Assumed Business Name Certificate of Klepper, Brown & Patterson, executed October 2, 1946, was thereupon produced and marked for identification as Exhibit 12.)

Mr. Green: No objection.

The Court (Fee, J.): Admitted.

(Said certified photostatic copy of Assumed Business Name Certificate, so received, was thereupon marked received as Exhibit 12.)

Mr. Dezendorf: Did I understand your former statement [20] correctly, Mr. Green, that it is conceded that the door of the office in the Yeon Building bears on the outside, facing the hall and the elevators, "Klepper, Brown & Patterson, Attorneys at Law", with the names "Milton R. Klepper, McDannell Brown" and "J. Robert Patterson"?

Mr. Green: That is correct, and that is not only on the door of the entrance to the office but I think the names, "Klepper, Brown & Patterson" appear on the other doors that face the hall.

Mr. Dezendorf: And also on the registry in the lobby of the building?

Mr. Green: I haven't seen it there, but Mr. Patterson tells me that is correct and we will admit it, "Klepper, Brown & Patterson".

Mr. Dezendorf: "& Patterson". I have one witness I would like to call. It is Mr. Martin. He is down in Mr. Cochran's office, awaiting call.

The Court (Fee, J.): Well, I think perhaps—Do you want to call him before noon?

Mr. Dezendorf: Whatever you wish.

The Court (Fee, J.): I think if you have completed your documentary——

Mr. Dezendorf: Well, he has another exhibit, which is the only one.

The Court (Fee, J.): How long will that take?

Mr. Dezendorf: On cross examination it might take some [21] while.

The Court (Fee, J.): In view of that, the court will recess until 2:00 o'clock.

(Whereupon, at 12:02 o'clock p.m., Friday, December 19, 1947, a recess was had until 2:00 p. m.) [22]

Afternoon Session, 2:00 p. m.

Mr. Green: If it please the Court, and Mr. Dezendorf, Mr. Klepper is coming into the courtroom to testify. Mr. Klepper is not well and I talked to him yesterday for the first time since he had his trouble, but he will be here; but I just want the privilege and want Mr. Dezendorf's permission that when he does come and knock on the door that we put him on the witness stand and not have him waiting around in the hall there.

The Court (Fee, J.): I shall be very glad to do that, Mr. Green, any time.

Mr. Green: He said he would be here, Mr. Dezendorf, sometime about 2:30, so I would like that privilege.

The Court (Fee, J.): This not being a proceeding where we have to maintain discipline, we will put him right on, in the middle of another witness' testimony.

Mr. Dezendorf: Shall we proceed?

The Court (Fee, J.): Yes.

Mr. Dezendorf: Mr. Martin, will you step forward.

JOSEPH GERALD MARTIN

was thereupon produced as a witness and was examined and testified as follows:

The Clerk: Will you state your full name, please. A. Joseph Gerald Martin.

(The witness was then duly sworn.) [23]

Direct Examination

By Mr. Dezendorf.

Q. Your name is Joseph Martin?

A. Yes.

Q. And where do you live?

A. I live at 1208 Northeast 8th. I have just changed addresses recently.

Mr. Green: I didn't get it, please.

A. 1208 Northeast 8th. I have just changed addresses recently.

Q. (By Mr. Dezendorf): Do you remember an occasion when you went in to talk to Mr. Patterson in the United States District Attorney's office? A. Yes.

Q. What was the occasion for you going there?

A. Well, I had some back money coming from the Merchant Marines that they had tied up in the court in San Francisco and two suitcases full of clothes.

Q. How did you happen to go in to see Mr. Patterson?

(Testimony of Joseph Gerald Martin.)

A. I was referred to him by Mr. McFarland.

Q. And who is Mr. McFarland?

A. He is Chief Probation Officer. I happen to be on parole right now and I am under Mr. McFarland. That is the reason I was referred to him by Mr. McFarland.

Q. Now, can you tell us, just as best you recall it, what the conversation was that you had with Mr. Patterson when you [24] went into his office?

A. Well, I asked him about if I could get them made out from here to get my money instead. He had advised me that it would be better to go to 'Frisco, but I told him that I didn't want to go to 'Frisco, because by the time I went to 'Frisco and paid for all my expenses down and back I figured it would be just as cheap to have the papers made out here and sent down.

Q. How much money was on deposit in the Clerk's office in San Francisco?

A. One thousand seventy-six dollars, and there was a few odd cents; I forget what the odd cents was.

Q. What did Mr. Patterson say about it?

A. Well, after he advised me to go down there, I said I would rather not. He said well, he would see what he could do for me, and he offered me to come down to the office when he give me this card that I have in my pocket now.

Mr. Dezendorf: Will you give the card to the Clerk, please. Will you have it marked.

(Testimony of Joseph Gerald Martin.)

(Said business card of J. Robert Patterson, so produced, was thereupon marked for identification as Exhibit 1.)

Mr. Dezendorf: I would like to offer that.

Mr. Green: I would like to make an inquiry before—it is marked for identification. I notice that there is another mark on it, “Exhibit 1, CDR”. [25]

Mr. Dezendorf: I can explain that, Mr. Green. Mr. Martin’s statement was taken on February 20, 1947, before the Committee, with Mr. Rauch acting as the reporter. His notes were taken but were not transcribed. That explains the mark on the exhibit.

Mr. Green: May I make inquiry, were all of the proceedings that were held at that time, were the notes taken of them, or just Mr. Martin’s?

Mr. Dezendorf: The only thing that was taken was Mr. Martin’s statement.

Mr. Green: We would make a request at this time of the Court—I want to say to the Court that I have inquired as to whether or not the notes were taken at the hearing and I have been told that they were not, by Mr. Patterson, not taken down, and I would make a request of the Court at this time and of the court reporter that we have the testimony transcribed that Mr. Martin gave before the Committee on February 20, 1947.

Mr. Dezendorf: No objection from our standpoint.

(Testimony of Joseph Gerald Martin.)

The Court (Fee, J.): Have you got the transcript?

Mr. Dezendorf: Never been transcribed.

The Court (Fee, J.): I have no objection, but then if you want to have the reporter produce it for you—

Mr. Green: I do not intend to insist upon the reporter producing it now or stop this proceeding. I simply make the request now that they be transcribed before this proceeding is finally terminated, so that they can be before the Court. I [26] will take care of the charges, so far as the expense is concerned. I will take care of that.

The Court (Fee, J.): That is what I say,—Mr. Dezendorf consents, and you make a deal with the court reporter and have him transcribe it.

Mr. Green: There is no objection, with that understanding.

The Court (Fee, J.): Admitted.

(The card referred to, so offered and received, having previously been marked for identification, was thereupon marked received as Exhibit 1.)

The Court (Fee, J.): I thought, perhaps, for the purposes of cross examination, you would like to have the notes read to you before you have to cross examine, Mr. Green.

Mr. Green: Well, it had occurred to me, your Honor, that it might be necessary for us to recall this witness at some time, because I would like to read those notes before I complete my cross examination. I intend to go ahead with the cross-examination. It may not be necessary to call

(Testimony of Joseph Gerald Martin.)

him, because I don't want to postpone this proceeding at all, I don't want to delay it, but I thought if in due season we would have a copy of the transcript we might then make request of the Court in proper form that this witness be recalled for cross examination, if we deem it necessary.

Mr. Dezendorf: I may say, Mr. Green, that the notes are very short. It will take only two or three minutes to have [27] them read.

Mr. Green: Okeh, that will be fine.

Mr. Dezendorf: I haven't completed my direct examination.

Mr. Green: I understand.

The Court (Fee, J.): As soon as the direct examination is completed the Court will recess and have the reporter get his notes and read them. Proceed.

Q. (By Mr. Dezendorf): Was anything said about you seeing another attorney?

A. Yes, I said that I would let him know if I would come back, because I would go and see my brother's attorneys.

Mr. Green: I can't quite hear, please.

The Court (Fee, J.): Speak up.

A. I did refer that I would probably go to see my brother's lawyers and I would let him know later what I was going to do, whether I would have him go ahead with the papers or what.

Q. (By Mr. Dezendorf): Now, you said a minute ago that he said to have you come down

(Testimony of Joseph Gerald Martin.)

to the office. Was that the office mentioned in your card?

A. I imagine it was, because that was the office in the card he gave me.

Q. Was anything said about the amount that would be required in attorney's fees to accomplish this?

A. He said approximately a hundred and seventy-five. There was no set price. [28]

Q. Did you see him again after that?

A. No, sir.

Mr. Dezendorf: That is all the direct examination.

Cross Examination

By Mr. Green:

Q. Mr. Martin, you say you are on parole?

A. Yes, sir.

Q. Out of this court? A. No, sir.

Q. What court?

A. I was tried overseas by the Army and I was sentenced to El Reno, Oklahoma, and I was paroled to Superior, Wisconsin, then I was transferred here.

Q. And what was the charge that you were convicted of?

A. For armed robbery with intentions of doing bodily harm.

Q. And that was while you were in the merchant marine? A. Yes, sir.

Q. And where was your trial?

A. In Brisbane, Australia.

(Testimony of Joseph Gerald Martin.)

Q. And what was the sentence that was imposed on you? What number of years, I mean?

A. Four years and \$500 fine, but it was cut; one year was cut off, and the fine was remitted.

Q. And isn't it a fact, Mr. Martin, that you told Mr. Patterson [29] that you couldn't go to San Francisco because you had been paroled and you had to stay within the state of Oregon?

A. No, I could have went with the permission of Mr. McFarland and Mr. Cochran.

Q. No, but my question is, didn't you tell Mr. Patterson that you couldn't go because you had to stay within the state of Oregon?

A. I don't recall telling him anything like that.

Q. You don't recall telling him that? Didn't Mr. Patterson tell you that the only way that you could get your money would be to go to San Francisco, or to employ some lawyer in San Francisco?

A. He said that would be the easiest way to get it, was to go right up and appear in court in 'Frisco.

Q. Didn't he also tell you that you would have to testify in court with respect to the matter?

A. Not that I recall.

Q. Not that you recall. And tell me again the statement you made to him as to why you didn't want to go to San Francisco.

A. Well, I figured it would cost me more money to go to 'Frisco and pay for a hotel and everything than it would if I were to employ a lawyer up here some place, but in my opinion I thought

(Testimony of Joseph Gerald Martin.)

that Mr. Patterson was supposed to do it free of charge.

Q. I see. [30]

A. That is why I told him to wait, that I would see another attorney.

Q. Now, who had told you that, that Mr. Patterson was supposed to do it free of charge?

A. Nobody told me that.

Q. How long have you been going to sea?

A. Well, I started in December of 1942 and was——

Q. After the war started?

A. Yes, and I sailed until December of '44, when I was tried overseas.

Q. Now, what is your brother's name that you refer to that had a lawyer in town?

A. Matthias Martin.

Q. And who was his lawyer?

A. I didn't even know at the time, but I know he has one, because he had an accident and he went down to see a lawyer about it.

Q. Did you go see him with respect to your money?

A. No, sir, I didn't go see him.

Q. Did you get your money finally?

A. Yes, sir.

Q. And through an attorney? A. Yes, sir.

Q. Some attorney here?

A. In Portland, yes, sir. [31]

Q. Who was the lawyer that you employed?

A. William Langley.

Q. William Langley; and you didn't go to San Francisco? A. No, sir.

(Testimony of Joseph Gerald Martin.)

Q. Now, the question with respect to a fee or whatever charge was made, isn't it a fact that what you asked Mr. Patterson was what he thought a lawyer would charge you? Isn't that what you asked him?

A. Approximately how much it would cost to get it.

Q. Yes; and he said that in his opinion it would probably cost about \$175, is that right?

A. Well, I was more or less asking him on his part how much it would cost.

Q. Just answer my question, please. Isn't it a fact that that is what you asked him and that is what he told you?

A. That is what he told me.

Q. Yes. A. Yes.

Q. And that is what you were trying to find out, what your approximate cost would be?

A. Yes.

Q. And it did cost you an attorney fee, didn't it?

A. It did cost me an attorney fee, but I had a set fee when I got it.

Q. I see. Didn't Mr. Patterson also tell you that if the [32] money were with the Clerk of this Court then he would be of assistance to you, but that he couldn't go to San Francisco?

A. I don't recall whether he said it that way or not.

Q. You have told the Court here approximately the same thing you told the Committee in February of '47, have you? A. Yes, sir.

Q. What are you doing now?

(Testimony of Joseph Gerald Martin.)

A. Working for Piggly Wiggly's.

Q. Piggly Wiggly? A. Yes.

Q. Mr. Martin, let me refresh your memory a little on this and see if this isn't, generally, in substance, what happened and what the conversation was,—that Mr. Patterson first told you that in his opinion the best thing for you to do was to go to San Francisco?

A. Yes, he did say that.

Q. All right; then when you told him you didn't want to go to San Francisco he said, well, then the next best thing to do is to get an attorney; is that right? A. Yes.

Q. And he inquired of you as to whether or not you had an attorney and you told him you didn't have but your brother did; is that right?

A. That is right.

Q. And he then told you to go see your brother's attorney, [33] didn't he?

A. Not that I recall?

Q. Beg your pardon?

A. Not that I recall, he didn't tell me to.

Q. Well, didn't he suggest to you that you see your brothers' attorney?

A. No; I think I was the one who suggested that I see my brother's attorney.

Q. All right, you suggested that, and then he told you that if you didn't get satisfaction in one of these ways to come down to his office, is that right?

A. Well, I don't recall whether it was said in that manner or not.

(Testimony of Joseph Gerald Martin.)

Q. And that Mr. Patterson finally concluded by saying he would see what he could do for you; is that right? A. Well, in a way, yes.

Mr. Green: I think that is all. No, just a minute. I wanted to ask you one more question. Where were you charged with having deserted the ship?

A. That was in Brisbane, in September of '44. I missed the ship in Brisbane, Australia. That is where I had that money coming from. But I was taken up in front of the Coast Guard over there, and they give us six months probation. In other words, if I missed another ship in six months my seaman's properties would be taken from me, and I was put on another [34] ship by the Coast Guard over there.

Q. What was the occasion of your having missed the ship the first time, when you were put on this probation?

A. Three of us went down the beach, with the steward's permission, and when we came back the ship was gone.

Q. And that was why you had this money coming?

A. Yes, that was back money I had coming off of that ship that I missed.

Q. The Captain filed charges against you that you were a willful deserter, didn't he? Weren't those the charges filed?

A. Yes, that is what he filed when he went to San Francisco, but we was tried for it in Brisbane, Australia.

(Testimony of Joseph Gerald Martin.)

Q. But you wrote to the Captain and tried to get him to change that and he wouldn't do it?

A. I wrote to the Clerk of the court first and the Clerk said I would have to write to the Captain, and I wrote to the Captain about it.

Q. And the Captain said no, you were a willful deserter, is that right?

A. That is what he said.

Mr. Green: I think that is all.

The Court (McColloch, J.): Let's have Captain Rauch read his notes to you now, if you want to hear them, Mr. Green. He said he could read them to you in three or four minutes.

Mr. Green: Well, I would like to have this witness excused [35] from the room while they are being read, your Honor.

The Court (McColloch, J.): All right, go on out of the room.

(Witness excused.)

The Court (McColloch, J.): Have him stay right there in the hall.

(The reporter thereupon read to the Court and counsel the oral examination, on February 20, 1947, of the witness Joseph Martin before the Committee on Discipline to the Bar of the United States District Court.)

Mr. Green: I don't think that I desire to recall the witness for cross examination, but I do make request that this transcript of Martin's testimony read by the reporter be transcribed and introduced

in evidence and let it come in as a defendant's exhibit.

Mr. Dezendorf: No objection.

The Court (Fee, J.): You make your arrangement with Mr. Rauch and it may be put in evidence.

(The reporter thereafter transcribed his said shorthand notes of said examination of the witness Joseph Martin before the Committee on Discipline to the Bar of the United States Court on February 20, 1947, and said transcript was marked Exhibit 13.)

Mr. Dezendorf: May I tell the witness he can be excused? [36]

Mr. Green: Yes.

Mr. Dezendorf: Just one more matter that I think is not covered by the record thus far made. In our allegation we charge that Mr. Patterson represented and held himself out as practicing law with Milton R. Klepper, McDannell Brown and himself, although he was not then and is not now a partner with Milton R. Klepper, McDannell Brown, nor either of them. I do not at the moment have any proof of that. However, it can be proven through Mr. Klepper. Is there any objection, or does the Court have any objection, to proving that matter when Mr. Klepper comes? Otherwise, I am ready to rest.

Mr. Green: Well, I don't get exactly what you are driving at. You want to prove that Mr. Patterson held himself out as a partner by Mr. Klepper? I don't get you.

Mr. Dezendorf: No, it doesn't have anything to do with holding himself out. It is the fact that no partnership exists.

Mr. Green: I think, Mr. Dezendorf, because there is going to be a contention—in our answer we very definitely put you on notice as to what our contention is in that regard. It is going to be our contention that that statement is entirely erroneous. There is no suggestion there that there is a special or limited partnership.

Mr. Dezendorf: All I am trying to prove is that no partnership existed at this moment.

Mr. Green: I understand that, but we contend that no [37] partnership existed.

Mr. Dezendorf: I have asked you if you would mind my putting on that portion of my case with Mr. Klepper?

Mr. Green: I have no objection to your withholding a portion of your case, if that is what you are talking about, withholding your case, so that we can go forward.

Mr. Dezendorf: That is all I am talking about.

Mr. Green: All right, I have no objection to that.

Mr. Dezendorf: That is all we have at this time—oh, one more thing. Several weeks ago I compiled the opinions of the Committee on Professional Ethics and Grievances of the American Bar Association having reference to each of these charges and gave a copy to Mr. Green. I have two other copies, one of which I would like to use during the hearing for myself and then I can pass it up with this one for the Court.

The Court (Fee, J.): The Court will treat that as a brief.

Mr. Green: Not being received as any evidence, as I understand it.

Mr. Dezendorf: No.

The Court (Fee, J.): No, the Court receives it as a brief.

Mr. Green: Now, may it please the Court, on page 7 of our answer I want to add one word in line 24—two words, in fact. I am sorry I didn't file two answers with this Court. It didn't occur to me that it was going to be a two-judge court, and it didn't occur to me—I knew it, but it didn't occur to me that [38] I should file two answers. The sentence in line 24 reads “that defendant always considered himself a quasi- or limited”—“or special”—I want to add those two words “or special”.

Mr. Dezendorf: No objection.

The Court (Fee, J.): I will just write it in.

Mr. Green: There is one other correction that I want to make. On page 3 of the Answer, line 1, appear the words “although he expected to be called as a witness at the trial.” I want those words stricken from the Answer, because it does not conform to the facts, and I ask leave of the Court that our Answer be amended in that particular. I don't ask leave to file an amended answer complete, but that line, just a pen mark be drawn through it.

The Court (Fee, J.): Any objection?

Mr. Dezendorf: No objection.

Mr. Green: Now, your Honor, before I pro-

ceed with the case for the defense here, when Mr. Dezendorf read the Complaint he read a certain portion of the Answer that we had filed and he failed to read the affirmative allegations of the Answer, and I think possibly I waived the right to do that by not insisting upon it at the beginning of the proceeding, but I did not know whether I should do it at that time; but I at this time want to read the Answer, with the Court's permission, unless your Honors have both read it. Now, if you have, I am not going to take up time, but I would like to read his answer as to the affirmative allegations, so with the testimony that we produce the Court will have that in mind with respect to the Answer and what we have alleged in the Answer.

The Court (Fee, J.): I may say that, although we are sitting en banc, I am treating this as though I were trying it on my own personal responsibility. I have read the answer.

Mr. Green: Well, may I inquire as to whether Judge McColloch has read the answer.

The Court (McColloch, J.): Yes, I read it yesterday afternoon.

Mr. Green: All right, that is all that I want to know, because——

The Court (Fee, J.): At this time, having made this amendment that you requested, in striking that out, I now direct that the Answer be introduced in evidence as it was prior to marking it.

Mr. Dezendorf: Might I suggest, also, that the earlier answer be introduced, too.

(Answer of J. Robert Patterson to the Amended Complaint, filed December 17, 1947, so received, was thereupon marked received as Exhibit 14.)

Mr. Green: I haven't any objection to introducing the first Complaint, the second Complaint, and having all of them go in. I have no objection to them all going in.

The Court (Fee, J.): All right, simply introduce all the [40] pleadings.

Mr. Green: All the pleadings go in.

(The following documents, so received, were thereupon marked as follows:

(Complaint in Disciplinary Proceedings, in the District Court of the United States for the District of Oregon, entitled United States of America, plaintiff, vs. J. Robert Patterson, defendant, filed March 12, 1947, was marked received as Exhibit 15;

(Amended Complaint in Disciplinary Proceedings, In the District Court of the United States for the District of Oregon, entitled United States of America, plaintiff, vs. J. Robert Patterson, defendant, filed April 16, 1947, was marked received as Exhibit 16;

(Answer, in the District Court of the United States for the District of Oregon, entitled United States of America, plaintiff, vs. J. Robert Patterson, defendant, filed May 9, 1947, was marked received as Exhibit 17; and

(First Amended Complaint in Disciplinary Proceedings, in the District Court of the United States for the District of Oregon, entitled United States of America, plaintiff, vs. J. [41] Robert Patterson, defendant, filed December 4, 1947, was marked received as Exhibit 18.) [42]

J. ROBERT PATTERSON

was thereupon produced as a witness on his own behalf and was examined and testified as follows:

The Clerk: Your name is J. Robert Patterson?

A. Yes, it is.

(The witness was thereupon duly sworn.)

Direct Examination

By Mr. Green.

Q. Your name is J. Robert Patterson?

A. Yes, it is.

Q. Where do you reside, Bob?

A. 1717 Park Avenue, Milwaukie, Oregon.

Q. Who long have you lived in Oregon?

A. I have lived in Oregon all my life.

Q. Born here?

A. Yes, I was, in Hillsboro.

Q. And married or single?

A. I am married.

Q. Any children?

A. Yes, I have one child.

Q. How old? A. Sixteen months.

Q. And you are admitted to practice law?

A. Yes, I am.

Q. And when? [43]

A. In 1941, in September.

(Testimony of J. Robert Patterson.)

Q. And what had you done before you took up the study of law?

A. Well, after I graduated from Hillsboro High School I went to Pacific University for one year and then I went to the University of Oregon for one year, and during the summer months I secured a position in the First National Bank of Portland out at Hillsboro and I began work there as a bookkeeper and went to Northwestern School of Law at night, and during the time that I studied at Northwestern I worked in the First National Bank of Portland at Hillsboro, and also at numerous branches here in Portland, and graduated from Northwestern in May of 1941 and took the bar exams in July of that year, and then I continued to work in the bank until January 1st, of 1942 and at that time I went to work as a Claim Representative of the Mutual Life Insurance Company of New York and I worked with them until March of 1943, at which time I entered the United States Maritime Service and I was——

Q. Served with them how long?

A. Pardon?

Q. Served with them how long?

A. I served with them until October of 1944, at which time I became associated in the practice of law with Mr. Klepper.

Q. And did I ask you your age? How old are you?

A. I am thirty.

Q. Now, you went to Hillsboro High School?

A. Yes, I did.

(Testimony of J. Robert Patterson.)

Q. You were born in Hillsboro, on a farm?

A. No, in the city.

Q. And what was your father's business?

A. My father was a bricklayer.

Q. And other brothers or sisters?

A. One brother and one sister.

Q. Older or younger?

A. Both of them are older than I am.

Q. Now, when you became associated with Mr. Klepper, what date did you say that was?

A. That was in October, 1944.

Q. That was in the Yeon Building?

A. Yes, it was.

Q. Let's come down to the specific complaints that have been made against you here. Did you file a proceeding on behalf of Hughes?

A. Yes, I did.

Q. Against the Alaska Steamship Company?

A. Yes.

Q. Was Mr. Klepper co-counsel?

A. Yes, he was.

Q. Was the matter tried in court?

A. I didn't get the question.

Q. I say, was the matter tried in court? [45]

A. Yes, it was.

Q. A jury or court proceeding?

A. It was a court proceeding. There was no request for a jury trial.

Q. When you filed that case were you Assistant United States Attorney?

A. Yes, I was.

(Testimony of J. Robert Patterson.)

Q. And when were you appointed Assistant United States Attorney?

A. May 21, 1945.

Q. And are you still Assistant United States Attorney? A. Yes, I am.

Q. Now, Mr. Patterson, it is alleged in this complaint here that you knew that one of the defenses that would be urged by the defendants was that the plaintiff's complaint should be served against the United States of America.

A. Well, that was one of the defenses that was raised in the answer, all right, by the other attorneys.

Q. You filed this case against the Alaska Steamship Company in good faith? A. Yes, I did.

Q. And did you represent Hughes in good faith?

A. Yes, I did.

Q. And the decision in that case was adverse?

A. Yes, it was.

Q. Now, let me ask you the question, because this involves [46] an attorney in the matter, were you familiar at that time with a decision of the Oregon Supreme Court in the Hust case? I mean in your reading of the law, so as to advise you, did you have that before you?

A. I think the Hust case was decided either before or during or after my complaint was filed, I am not just certain, but sometime during the proceedings I did know of the Hust case and had read it and was familiar with the decision, but I am not just certain as to when that was handed down, as to whether it was before or during or after I had filed the complaint.

(Testimony of J. Robert Patterson.)

Q. Were you familiar with the Brady case?

A. Yes, I am.

Q. And the Quinn vs. Southgate Navigation Co. case?

A. Yes. I believe I prepared a brief in which those cases were given attention.

Mr. Green: I don't know, your Honor, as to how far we should go in questioning him with respect to the law in this situation. We are all lawyers in this courtroom, and I don't know just how far we should go in respect to legal questions, or whether that is only a matter for argument. I don't know what the procedure is.

The Court (Fee, J.): Well, there isn't any procedure, particularly, Mr. Green. You develop your case as you wish to and so far as you wish to go. The particular question to be decided is not a question of law. It is a question of [47] attitude and the ideas of the defendant.

Mr. Green: I think on this first count, your Honor, if I might be permitted to say so, that that particular count is largely a matter of law,—I mean, the way I look at it. Your Honors may disagree with me entirely.

The Court (Fee, J.): It is not, however, a question of law, Mr. Green, because that is not what we are trying. We are not trying the law of that case, except if a person took an absolutely unfounded position, that would be the only question involved.

Mr. Green: Let me state to your Honors just exactly what I have in mind,—and I know that

(Testimony of J. Robert Patterson.)

the question of good faith, as to whether or not he gave his client good representation, or whether or not he was honest and conscientious in dealing with his client, I know that is involved in this particular case, and I just want to say this,—where I think the question of law comes into it—in the Hust decision Judge Black held that the general agent was employed as an operator *pro hac vice*, which means that you are liable for your own torts. It was decided June 10, 1942. Now, under that ruling, where they held a special concurring opinion, what was done in this case where Hughes sued the Alaska Steamship Company, in my judgment, would be the thing that every lawyer should advise his client to do, according to Justice Black's and Justice Douglas' ruling. [48]

Now, in the case decided in June, 1944, the Caldarola case, which was a 5-to-4 decision, they still adhered to the position taken by Justice Black and Justice Douglas in the Hust case, but the five decided no, that was not right.

The point I am getting at is simply this, that here we have a situation where, according to four judges of the Supreme Court of the United States, or, very affirmatively, three of them, Black, Douglas and Murphy, what this man did was the advice that should have been given to his client. No, five of the Judges of the Supreme Court say, that is wrong, they can't hold that way. So that is just the point I raise with respect to the Hughes case and the charges here, that are that he could

(Testimony of J. Robert Patterson.)

not represent the plaintiff against the United States of America. We admit he could not do that, but he could represent the plaintiff, under what Black, Douglas and Murphy said, and that is exactly what he did.

The Court (Fee, J.): I will tell you right now what my attitude is,—that a lawyer who is representing the United States has to deal very carefully with the situation, and he has to not only take into consideration what is held by the courts but what may be held.

Mr. Green: Well, I agree with your Honor, but the point that I make is that, to me, if the man makes a mistake of judgment,—and that is exactly what we have said in the answer, that he made a mistake in judgment, that it was not part of his [49] consciousness or mind in any attempt to deceive—it is a pretty hard rule for the lawyers, even whether he represents the United States or not, when we have to speculate and agree on what the courts are going to determine; it makes it a very hard test.

The Court (Fee, J.): I am very firm in that conviction, that a lawyer representing the United States of America shouldn't get himself in a situation where he is representing an interest which is opposed to the United States of America, under any possible decision that should be rendered by any court.

Mr. Green: And I state that what he was trying to do at that time was to establish a liability against the Alaska Steamship Company, which

(Testimony of J. Robert Patterson.)

would be a complete defense in as far as the liability of the United States of America is concerned.

The Court (Fee, J.): Well, as I say, I do not view it as a question of law at all.

Q. (By Mr. Green): Mr. Patterson, during the time that you were representing Hughes did you act, with respect to Hughes, in good faith?

A. I never at any time felt that I was doing otherwise.

Q. Did you do so with respect to the United States of America? A. Yes, I did.

Q. And was it ever suggested to you or did it ever occur to you that there was any impropriety with respect to representing Hughes in the case of the Alaska Steamship Company? [50]

A. Not by anyone.

Q. And when you asserted this claim against the Alaska Steamship Company was it your thought—or state whether or not it was your thought that you were protecting the United States of America?

A. Well, yes, I did.

Q. Mr. Patterson, in those cases, while you were here as Assistant United States Attorney,—or active, I am talking about now—in the defense of those cases, what was your observation of who appeared in the defense of those cases?

A. The defenses were all carried on by private insurance carrier attorneys. We did not appear in them. That was another reason why I felt that there could not be any conflict in interest, where private attorneys are conducting the defense.

Q. With respect to your representation of Mr.

(Testimony of J. Robert Patterson.)

Bowden, I want you to tell the Court when you first became acquainted with Mr. Bowden?

A. Well, I became acquainted with Mr. Bowden about a little over a year before the time he was placed in jail. His brother, or cousin, who is a very distant relative of mine,—they had a fishing boat down at Newport and wanted me to arrange for powers of attorney and a transfer of interest in the vessel so they could procure some documents, and I prepared those papers for them. And then on another occasion they transferred the interest again, so it required a redocumentation of the [51] vessel and I also prepared those papers for them. That was about seven or eight months later. And then along about in May Mr. Bowden came in my office one day with a divorce complaint that his wife had filed against him——

Q. May of what year?

A. That would be May of 1946,—and told me that he did not want his wife to have a divorce if there was any way to prevent it. One of the reasons was because of his religion, and some other facts that he told me about. After he had told me about the situation there in regard to his wife and his home, I felt that he might have a good defense to the divorce suit and so advised him, and he authorized me to file an answer in his behalf, which I did, and——

Q. Now, that was in the Circuit Court of Multnomah County?

A. That was in the Circuit Court of Multnomah County.

(Testimony of J. Robert Patterson.)

Q. All right.

A. And then upon three or four different—about three different occasions during the pendency of this divorce case he came to my office and discussed with me the merits of the divorce case and the facts surrounding it and some of his difficulties at home. And then on the day before he was arrested he came about eleven o'clock in the morning and told me he was going to Newport to see about the fishing vessel and I think told me that, if possible, he was going to go out fishing, he thought maybe that would clear up matters at home [52] while he was gone, and told me if anything come up I could reach him in the Abbey Hotel at Newport. And then Sunday morning I got the papers that had a report in it about his wife's death.

Q. You mean the newspapers?

A. I mean the newspapers. So I called the Police Station at the time and told them that I represented Mr. Bowden and told them if he came in there to call me, that I wished to arrange bail for him; and I didn't receive any call, so I went down there, and at that time one of the jailers told me that they wished me to not see him, as he hadn't seen the papers and didn't know anything about his wife's death, and I told him I would do that. About eleven-thirty I received a call from the Police Station telling me that they thought if I would come down and talk to him he would give me a statement. They let me see him alone, and he told me what the facts were

(Testimony of J. Robert Patterson.)

and I then told them I thought he would give Mr. Handley a statement, and after he gave them a statement a first-degree murder charge was filed against him, and he or his relatives asked me to represent him, and I told him at that time that I was up here and I couldn't give it the time that it would require and told them they had better get someone else to assist me, and a couple of days afterward I procured the services of Mr. Edwin Hicks and from then on he handled it, although I did assist him. I interviewed some of the witnesses and interviewed Mr. Bowden, and I also [53] sat in on the trial in the Bowden case. It was tried in the Circuit Court of Multnomah County.

Q. Were you there all during the trial?

A. No, I wasn't there during the entire trial.

Q. Now, with respect to your duties in the United States Attorney's office, what did you do with respect to those duties while you were on the Bowden trial?

A. While he was on trial I took a leave of absence from the United States Attorney's office. It was charged against my annual leave.

Q. Did you participate in the trial?

A. I did cross examine Mr. Schaefer, at the request of Mr. Hicks, when a certain conversation that he testified occurred and I was the only one present, and then Mr. Hicks also cross examined him, and that is the only part that I took in the entire trial, was this short examination of Mr. Schaefer.

(Testimony of J. Robert Patterson.)

Q. Did you, prior to going into this matter for Mr. Bowden, have a conference with the State authorities?

A. Yes, Mr. Hicks and I had two or three conferences with them.

Q. And with whom did you talk?

A. Mr. McCourt and Mr. Collier, and also, I think, Mr. Bagley.

Q. Mr. Handley was the first man?

A. Mr. Handley, I believe, died in the meantime.

Q. And did you, at the time during the trial of that proceeding [54] —was it ever brought out before the Court or before the jury that you held any position with the United States Attorney?

A. No, it was not.

Q. Now, Mr. Patterson, the manual issued by the Attorney General's office reads as follows: "In the interest of cooperation between the two prosecuting agencies and for other obvious reasons, Assistant United States attorneys should not accept employment to defend persons charged with a crime in a State court." Now, were you at that time familiar with that manual?

A. No, I was not, Mr. Green.

Q. Had it been shown to you?

A. No, it had not. I do say that on certain occasions I think that Mr. Hess had taken excerpts from the manual out and sent them back as memos to all the assistants on certain other matters, but I didn't know where they came from.

Q. And were you aware of any restriction upon

(Testimony of J. Robert Patterson.)

the power of an Assistant United States Attorney to appear in a case of this type?

A. No, I was not.

Q. Did you make any presentation to the jury?

A. No.

Q. Did you make any opening statement?

A. No.

Q. Did you make any argument? [55]

A. No.

Q. Were you aware at that time that you were breaching any canon of ethics, any rule of propriety, in what you were doing?

A. No, I was not.

Q. Now, you did receive a fee?

A. Yes, I did.

Q. And Mr. Hicks received a fee?

A. Yes, he did.

Q. After you called Mr. Hicks in, as I understand it, the sole responsibility of the trial was accepted by him? A. Yes, it was.

Q. Now, Mr. Patterson, I want you to tell, in respect to the third charge, this sailor, Mr. Martin, who testified here, just what was your contact with Mr. Martin?

A. Well, about 1:30 one afternoon Mr. McFarland brought Mr. Martin into my office and told me that he was one of his probationary men and that he had some matters which he wanted to discuss with me, and he at that time had a letter, —I believe two letters, one from the District Court in San Francisco saying that he had this money on deposit,—I believe it was \$1075, or something

(Testimony of J. Robert Patterson.)

like that—and also a letter from the captain of the vessel saying that the captain would not withdraw the charges against him so that he could get his money back.

Q. Did that letter indicate what the charges were?

A. Yes; he was charged with willful desertion aboard the ship. As I remember, it was at Sydney, Australia, but it may have been Brisbane.

Q. Were you informed at that time as to why Mr. Martin was on probation?

A. I thought it was for willful desertion from the ship.

Q. No, but I mean were you informed as to why he was on probation? A. No.

Q. Go ahead. What was your conversation then?

A. Well, Mr. McFarland left then, after he had introduced the boy, and Mr. Martin told me his predicament, that he had the money down in San Francisco, and he wanted to know if there was any way to get it back, and I told him if the money had been here in Oregon that I would prepare the papers for him up here in the court and try to assist him in getting his money back, that we had done that, that had been our practice, but I informed him, in view of the sum of money and in view of our experience with the court here, that they wouldn't give him his money back, he should have to go to San Francisco and appear in court and testify. I told him he should go to the United States Attorney's office in San Fran-

(Testimony of J. Robert Patterson.)

cisco or get a private attorney there. He told me at that time he couldn't go to San Francisco because he couldn't leave the District. I told him I was sure he wouldn't have any trouble arranging with the court to go down there for that purpose. He said no, there were certain other reasons why he didn't want to go down. So [57] I then asked him if he had an attorney and he told me no, his brother had one, and I told him to go and see his brother and if he didn't get any satisfaction to come and see me at my private office in the Yeon Building and I would see what I could do for him, and I then gave him a card. He asked me, before he left, "What is the approximate fee an attorney would charge for doing this?" I told him I didn't know, it would depend on the work you would have to do and whether or not he had to send it to a correspondent attorney down in San Francisco, that I thought the fee would be around \$175, and Martin thanked me and said he would think it over, and that is the last I saw of him.

Q. Until today?

A. Until today, and then the—well, no, I wasn't at that hearing. Today is the first time I have seen him since that time.

Q. Was this advice you gave him in good faith?

A. Yes, it was. I was only interested in seeing the boy get his money back.

Q. And there was no money ever paid you?

A. There was no money ever paid me, no.

(Testimony of J. Robert Patterson.)

Q. Had you acted for sailors before this court in Oregon to secure release of their money?

A. Yes, I had.

Q. You had, before that time? [58]

A. Yes.

Q. And if the money had been in Oregon would you have so acted?

A. Yes, I would have. I might say, Mr. Green, that in 'most all instances in my experience at that time the Court had required the presence of the seamen in court, and that was one of the reasons I felt sure he would not be able to get his money unless he went to San Francisco in person.

Q. Now you are talking about that if the court in Oregon had had the money in court——

A. Yes, I am.

Q. —testimony had been taken and some facts adduced, or testimony in other form?

A. Yes; the man is placed on the witness stand, generally.

Q. Now, with respect to the charge numbered (d) sub-paragraph (d) of the complaint,—this involves the Costello case, proceedings filed in the record and exhibits. What did you have to do with the Costello situation?

A. Well, I had represented the United States before the grand jury and as a result Mr. Costello was indicted, and subsequently he was brought into court and entered a plea of guilty and the matter was referred to the Probation Officer, and subsequently he was brought back into court for

(Testimony of J. Robert Patterson.)

sentence, and then I believe the Court placed Mr. Costello on probation or suspended sentence.

Q. Did you make any recommendation? [59]

A. No, I did not.

Q. Were you asked by the Court as to whether or not you had a recommendation?

A. Yes, I believe I was.

Mr. Green: I would like to introduce in evidence a copy of the transcript of the proceeding in C-16714 and C-16715, unless those are in the Costello—Are they in the judgment roll? May I ask that question?

Mr. Dezendorf: I think a copy of it is in the file.

Mr. Green: Well, your Honors, if this is in as a part of the judgment roll I have no desire to burden the record or incumber the record. It is 16714 and 16715.

The Court (Fee, J.): The transcript of the proceedings of December 7, 1945, and transcript of the proceedings of January 4, 1946, are in the file.

Mr. Green: May I inquire the first date? December 7th?

The Court (Fee, J.): December 7th, 1945.

Mr. Green: And January 4th, 1946?

The Court (Fee, J.): Yes.

Mr. Green: Would the Court permit me to inquire this one question: The transcript that I have here is ten pages. I just simply want to see that the whole record is there. That is all I am concerned with.

(Testimony of J. Robert Patterson.)

The Court (Fee, J.): Yes, this is ten pages, with the reporter's certificate, Alva W. Person, on the eleventh page. [60]

Mr. Green: I was in error, your Honor, and I think that I misread, your Honor. The first proceeding that I have consists of four pages.

The Court (Fee, J.): Yes, there are four pages.

Mr. Green: Five pages—and then the second proceeding consists of ten pages.

The Court (Fee, J.): Four pages, and the reporter's certificate on the fifth page.

Mr. Green: And the other is ten pages, and the certificate on the eleventh page?

The Court (Fee, J.): That is right.

Mr. Green: Well, I haven't any desire to incumber the record, then, if that is already on file.

The Court (Fee, J.): These are on file, in both cases, a part of the record.

Mr. Green: Yes. Now, did you at that time share any fee with Mr. Klepper—no, strike that out, please. Were you associated with Klepper, did you occupy office space with Milton Klepper, at that time?

A. Yes, I had my private office with him at that time.

Q. And did you share in the fee that he received in the Costello case at all? A. No, I did not.

Q. I think there was one question on this other matter. Prior to the time that you were relieved of your duties in the United [61] States Attorney's office,—I am now referring to the Martin matter. That is the seaman's matter, where the money was

(Testimony of J. Robert Patterson.)

in the registry of the court in San Francisco.—was there a different practice established by the United States Attorney's office in Portland with respect to seamen that were charged as deserters? Did that happen before you left the office?

A. No, that was afterwards.

Q. It was afterwards. Now, with respect to sub-paragraph (e), which is an allegation that, commencing on or about October 2nd, 1946, you represented and held yourself out as a member of a partnership composed of Milton R. Klepper, McDannell Brown, and yourself, although you were not then and are not now a partner of Milton Klepper, McDannell Brown, or either of them. I want you to tell us and tell the Court in detail just exactly what your association with Milton Klepper was, what your arrangements were, and so forth.

A. Well, when I first went with Mr. Klepper, in October of '45,—or was that '44?—'44—Mr. Klepper paid me—I had a drawing account of \$50 a month, and Mr. Klepper shared in one-half of any fees that I obtained from my private business. Mr. Klepper furnished me office space, stenographer, stationery, and things like that. I performed work for him, and in cases that I had I naturally consulted with him. That was the arrangement until I went in the United States Attorney's office. I was associated with him. [62]

Q. When did you go to the United States Attorney's office?

A. May 21, 1945. That was about seven months,

(Testimony of J. Robert Patterson.)

seven or eight months, after I had first gone with Mr. Klepper.

Q. Did you have knowledge of Exhibit 12, which is an assumed business name filed by Klepper, Brown & Patterson?

A. No, I didn't know about that until after these proceedings came up.

Q. You knew about the stationery?

A. Yes.

Q. You knew about the letterheads?

A. Yes.

Q. You knew about the billheads?

A. Yes.

Q. You knew about the legal documents?

A. Oh, yes. Understand—I think we might get mixed up a little bit, Mr. Green. When I first went there that was not the situation. The situation was Milton R. Klepper,—

Q. I understand.

A. —and it was not until some time, I believe, in May of '46—

Q. Was it October of '46? A. Pardon?

Q. Was it October of '46?

A. Yes, I think that was the date.

Mr. Green: May this witness be withdrawn? [63]

The Court (Fee, J.): Yes.

(Witness excused.) [64]

MILTON R. KLEPPER

was thereupon produced as a witness in behalf of J. Robert Patterson and was examined and testified as follows:

The Clerk: Your name is Milton R. Klepper?

A. That is right.

(The witness was thereupon duly sworn.)

Direct Examination

By Mr. Green.

Q. How long have you been practicing law, Mr. Klepper?

A. Well, I was admitted in New York City in April, 1910, so I began practicing there after I got through school in June, 1910.

Q. Where did you have your legal education, Milt?

A. Columbia University, New York. Mr. Green, let me ask you, please,—I think I can make this, but it will perhaps be pretty slow, so if you just give me—not that you aren't—an emotional upset gets me.

Q. Let me ask you, Milt,—now, you just tell the Court and you tell me—you just came from the doctor's now?

A. I just came from the clinic, yes.

Q. Would you prefer to give your testimony at some other time?

A. No, I think that we should see. I think I can make it,—because, you see, I have had eight months of this, since May, and I am not progressing fast toward recovery. It takes a lot of time, they tell me, and I perhaps wouldn't be any better

(Testimony of Milton R. Klepper.)

a month from now than I am now, but I believe I will be all right, Mr. Green, but I just want to let you know to go slow and not get me upset.

Q. Any time you ask me to stop, just let me know and I will be very glad to do that.

A. That will be very kind.

Q. Now, Milt, I will make my questions just as few as possible. How long have you practiced in Oregon?

A. Since August or September, 1910, but I—yes, that would be right. I was admitted on probation for six months, I believe, at that time, and I actually was admitted permanently in April, I believe it was, of '11.

Q. Now, I want to ask you, Milt, what public offices have you held in the state?

A. State Senator from Multnomah County.

Q. For how many terms?

A. Four terms—well, now, wait,—I guess it would be considered two terms of two sessions each. That would be it.

Q. Milt, do you remember anything about the Hughes case, Hughes versus Alaska Steamship Company?

A. Yes, I remember something about that case, a couple of years ago, yes.

Q. Did you participate in the trial?

A. As I remember, I sat in the court. Maybe I participated a little bit. I am not sure. Maybe I did not. Maybe I took no [66] part, maybe I took a little part. The boys would remember. I don't remember who was on that case now. If I participated, it was very little.

(Testimony of Milton R. Klepper.)

Q. Was Hughes your client or was he a client of Bob Patterson's?

A. Well, I suppose it could be said that he was a client of the office, both of us.

Q. All right; but the main part of that trial work was handled by Bob Patterson, was it?

A. Oh, that is right.

Q. Now I want to come down to this one question here, that you have letterheads and stationery and billheads and legal documents or legal papers where it has printed thereon "Klepper, Brown & Patterson", is that right?

A. That is right, sir.

Mr. Green: And, Mr. Clerk, would you show him Exhibit 12, which is an assumed name certificate.

Q. Did you prepare and cause that document, which is Exhibit 12, to be filed?

A. Well, unquestionably I caused it to be prepared and, directly or indirectly, caused it to be filed. I imagine my stenographer prepared it, you know, naturally. Yes, that is right. That is my signature.

Q. Now Milt, I want you to tell what arrangements you had with Bob Patterson. Now, just confine your testimony to Bob Patterson. [67]

A. At the time this was filed?

Q. Well, after that, subsequent to that time.

A. Well, when Mr. Patterson first came with me, it must have been '46 or earlier, I believe I paid him a monthly salary—or weekly salary, it was, sort of a guarantee, call it salary, or whatever

(Testimony of Milton R. Klepper.)

you want to call it, I believe at the beginning \$50 per week, and such business as he would bring into the office would be the office business, or the business of the office, and he was to have fifty percent of that and fifty percent go to the office. And then at times there would be special cases where I would make a nice fee out of it and Robert would do the substantial part of the work. Now, that is before he came over to Mr. Hess' office. Say, for instance, I would make—have a nice piece of business and make a couple of thousand dollars fee, I would probably give Robert—I know I did at different times—we didn't owe him anything, but he did the work, likely, a nice piece of work—a couple of hundred dollars; so I would put my fee, for income tax purposes, eighteen hundred and give him a couple of hundred. There might be a little piece of business where I would make twenty dollars, he did it all,—you know, somebody would drop in,—I would say, “Well, Pat, here is five dollars,” something like that. He had to live, too, he had a wife and family. And so that is probably what I did with other boys: I have had different boys in the office over thirty or thirty-five years. So, you see, there were really [68] three things there: There might be a salary or drawing account, fifty dollars a week, enough to live on, I would say, and fifty percent of what he brought in, and then certain amounts of business, certain lines of business or pieces of business, he would be a partner on. In other words, a lot of those up there, there was kind of a special partnership, I will say. Maybe my mind isn't

(Testimony of Milton R. Klepper.)

working just exactly right. That is what it would be, a partnership basis.

Q. Now, Milt, let me ask you a question: Of that money, or while Bob Patterson was there, did you withhold any tax payments, or did he pay his entire tax? Were there any withholding taxes?

A. Say, Mr. Green, some of these things I may not be able to answer. Some of these things I may not be able to answer, and I can't answer that one right now without looking. I have been eight months away from my office and I haven't been thinking about legal matters. I can't answer that just now, how that was handled.

Q. Let me ask you, how often would it happen that you would give Pat a certain portion of the fee that you obtained?

A. Oh, that I can't answer, because I have no particular use to want to look it up, unless—we would have a particular piece of business, and my files or the record would show that I made two thousand dollars of that and my records would show I made two thousand—I mean eighteen hundred, and gave Pat two, but just the number of times I wouldn't know. It might be once a month, or twice a month, or once a week, for over a period of time. But I had Pat there helping as a partner, I would say, on those cases. We had quite a bit of work in the office.

Q. Now, Milt, would he go to court for you and argue demurrers?

A. Oh, yes, yes, that is it. Yes, he would

(Testimony of Milton R. Klepper.)

handle demurrers and motions and get pleadings ready on cases.

Q. Would he do any trial work?

A. Oh, yes.

Q. And would he assist you in trial?

A. Oh, yes, yes. And then we had the firm name there, Klepper—at first it was Mr. Calavan, and then he went into the Navy,—if I remember correctly, I carried his name in the firm, and then he gave up the law business and is studying to become a minister now, at a theological seminary in San Francisco, Corwin Calavan. Maybe some of you remember him. He will make a good minister, too,—carried his name there, Klepper, Calavan & Patterson. And we had to have insurance, about the only way we could keep the young fellow. In my time, do you remember, Judge Fee, when we got through at Columbia we went down to New York and started in at fifty dollars a month, and here the boys were getting fifty dollars a week. We had to pay them to get help.

Q. Now, there was a part of this time, Milt—or after Bob came into the United States Attorney's office did you still pay him the fifty dollars a week? [70]

A. No, I don't think so. No, I would say positively no, I did not. No. No, I did not pay him any salary.

Q. Well, after he came into the United States Attorney's office would he, upon your request, go to the court to argue a demurrer for you, or an ex

(Testimony of Milton R. Klepper.)

parte matter, or assist you in any matter that you had in the office?

A. Yes, as I remember, our relationship, to the best of my judgment now, remained the same, except the salary that I paid him. I was not responsible for any salary. He was earning his salary here after he moved from my office. But he would assist. I supposed that that was all right.

Q. Well, you didn't make any pretense or make any attempt to hide the fact that you had the name "Klepper, Brown & Patterson"?

A. Oh, no, we had the name just the same, as I recall it, on the door and on the stationery and in the pleadings.

Q. It is that way in the telephone book, isn't it, or not? A. Oh, yes.

Q. And in the City directory?

A. I presume so.

Mr. Green: Now, may it please the Court, one question I asked Mr. Klepper which I am anxious to have answered and which he can't answer, I would like to have some agreement or some manner by which the answer may be supplied, and that is whether or not he withheld a withholding tax when Mr. Patterson was there in his office or whether or not that tax was paid directly to [71] Mr. Patterson. He said he can't answer it now. I don't know whether he can go to the office and get the answer now, but I am wondering if we can agree on some manner whereby that can be supplied in the record?

Mr. Dezendorf: Agreeable with me.

(Testimony of Milton R. Klepper.)

The Court (Fee, J.): Yes. What method do you want to use?

Mr. Green: Well, my suggestion would be—I don't want to call Mr. Klepper up here again. I thought possibly he could go to his office sometime——

A. I think probably I can. I get down to my office once or twice a week for an hour or two.

The Court (Fee, J.): Well, I dislike that. Can't you agree on some statement, that Mr. Klepper, if he had his records, would testify to it?

Mr. Green: Well, the statement, the information that I have been given, that if he had his records he never withheld the withholding tax from Mr. Patterson, that this fifty dollars a week was paid to Mr. Patterson, and this matter is so significant and it has been passed up on by many courts, with respect to what is or what is not a part of the partnership, and that is one of the elements.

Mr. Dezendorf: I have no objection to admitting that no tax was withheld on the moneys paid to Mr. Patterson by Mr. Klepper.

The Court (Fee, J.): Does that satisfy you? [72]

Mr. Green: Yes, or let us say any moneys paid by Mr. Klepper to Mr. Patterson, or let us say any moneys received by Mr. Patterson while associated with Mr. Klepper there in the office. I want to make it all-inclusive. I don't want it to be just a matter of ten bucks. I want it to be all-inclusive.

Mr. Dezendorf: That is agreeable.

Mr. Green: Then it is stipulated that in any

(Testimony of Milton R. Klepper.)

moneys paid by Mr. Klepper to Mr. Patterson there was no withholding tax held out by Mr. Klepper or any other person, that Mr. Klepper paid him the whole amount. Is that agreeable?

Mr. Dezendorf: That is agreeable.

Q. (By Mr. Green): Mr. Klepper, you appeared in the Costello case, didn't you, as attorney for the defendant? Do you remember it at all?

A. Is that the narcotic case?

Q. Yes.

A. I did, that is—yes; yes, I appeared in that case at one stage of the proceeding,—arraignment or sentence, I believe.

Q. Can you recall any of the proceedings at all?

A. You mean that took place in the court?

Q. No, I will strike that question out. Mr. Patterson appeared there for the government, didn't he?

A. Well, now, I couldn't swear that Pat was there, or this [73] gentleman—you are Mr. Twining?

Mr. Twining: That is my name.

A. Yes,—or one of the other boys from the office, because—now, I am trying to explain why I can't fix that in my mind. There was really no proceedings there excepting the matter of sentence, as I recall, and a statement made by me, and I have no way of remembering anything that anyone from the District Attorney's office said, unless the Judge asked him and they said, "We have no recommendation," or something. So I am vague on that. However, let me say, it is my opinion that Mr. Patter-

(Testimony of Milton R. Klepper.)

son was there, and maybe one or two of the other boys from Mr. Hess' office. Mr. Hess might have been there himself. I don't remember. Because I didn't have any contact in any way with Mr. Hess' office. It was just a matter of possibly I thought I could be of some help to the Court and to the boy, of course, the investigation that I had made, which I told the Court about. Now, answering your question, or repeating it, perhaps,—you will pardon me—I can't swear definitely one way or the other, only it is my opinion that Robert was there.

Q. (By Mr. Green): Now, Mr. Klepper, this is a question, then I think I will close the matter: Did you always consider Mr. Patterson a limited or special partner of yours after you filed this assumed name certificate?

A. Well, even before that was filed—I don't know whether we used "limited" and "special" or not—— [74]

Q. No, I mean as to what was in your mind?

A. —as synonymous, but he was a partner, I would say a limited partner, with me, as Calavan and Brown. That was all, in my consideration. I think partnership, although I studied partnership under Bob Burdick (?), as some of you remember it, you generally look at it as an easy subject, but sometimes it isn't so easy. But I did always consider Patterson and some of the other boys had a special partnership.

Mr. Green: I think you may take the witness.

Mr. Dezendorf: Is it agreeable with you, Mr.

(Testimony of Milton R. Klepper.)

Green, if I adopt as part of my case Mr. Klepper's testimony with respect to the relationship between him and Mr. Patterson, without restating it?

Mr. Green: That is agreeable. I think you have that right, anyway.

Mr. Dezendorf: Is it agreeable with the Court if that be done?

The Court (Fee, J.): I didn't understand.

Mr. Dezendorf: If I adopt as part of our case Mr. Klepper's statement as to the relationship between him and Mr. Patterson, the way it occurred?

The Court (Fee, J.): Yes.

Cross-Examination

By Mr. Dezendorf:

Q. Did you consider Mr. Patterson a special or limited [75] partner after he went into the United States Attorney's office?

A. Now, you say "special or limited." I don't think those words are synonymous. Maybe you did not intend to use them that way. I think we had, as a matter of fact, at least from my standpoint, kind of a partnership arrangement or condition there. We carried his name. I believe we carried his name, I carried his name, on the letterhead of the firm and on the door, and he did certain work for me.

Mr. Dezendorf: That is all.

Mr. Green: I think that is all, Mr. Klepper. Thank you very much.

(Witness excused.)

Mr. Green: We have been here, your Honor, since 2:00 o'clock. May we have a recess for five minutes? I would like to have Mr. Patterson go down with Mr. Klepper to get a cab, or perhaps his wife is waiting down there. I would like to have a recess for five minutes.

The Court (Fee, J.): Court is in recess.

(Short recess.)

Mr. Green: With the permission of the Court, I would ask leave to call Mr. Hicks and interrupt the examination of Mr. Patterson. Mr. Dezendorf said he would not object.

Mr. Dezendorf: No objection.

Mr. Green: Take the stand, Mr. Hicks. [76]

EDWIN D. HICKS

was thereupon produced as a witness in behalf of J. Robert Patterson and was examined and testified as follows:

The Clerk: Your name is Edwin D. Hicks?

A. Yes.

(The witness was thereupon duly sworn.)

Direct Examination

By Mr. Green:

Q. Mr. Hicks, you are a practicing lawyer in the state of Oregon? A. Yes.

Q. Admitted to practice when? A. 1928.

Q. You are a graduate of what school?

A. University of Oregon.

Q. Take any post-graduate work?

A. Yes, at Yale University for one year.

Q. Where did you first practice?

(Testimony of Edwin D. Hicks.)

A. At Canyon City, Grant County, Oregon.

Q. Did you hold any public office?

A. I was District Attorney there for four years, '28 to '32.

Q. Have you ever held any office with the United States of America?

A. Yes, I was Assistant United States Attorney for the District of Oregon for three years, 1933 to 1936. [77]

Q. Who was United States Attorney at that time? A. Carl Donaugh.

Q. And you are now in private practice?

A. Yes.

Q. And you office in the Failing Building?

A. In the Failing Building.

Q. And you are there associated in practice with Mr. Tongue and Mr. Davis? A. Yes.

Q. Do you know Mr. Patterson?

A. Yes, I do.

Q. How long have you known him?

A. Well, I think I have known him about six years. That is roughly correct.

Q. Now, Mr. Hicks, were you associated in the defense of the Bowden case? A. I was.

Q. And how did you get into that case?

A. I was referred in that matter by Mr. Patterson to Mr. Bowden, whom I had not known before that time. Mr. Patterson had represented Mr. Bowden in some divorce and other proceedings.

Q. And from that day forward who had charge of that defense? A. I did.

(Testimony of Edwin D. Hicks.)

Q. Mr. Patterson did receive some fee for that, for his work in that? [78]

A. Yes, he received one quarter of the stipend or compensation that was paid.

Q. Now, did you or Mr. Patterson have any conference with the prosecuting attorneys for the State of Oregon?

A. Yes, we did; we had a number of them.

Q. And to your knowledge, did they have knowledge of the fact that Mr. Patterson was Assistant United States Attorney?

A. Yes, they knew that.

Q. Was there any expression of the prosecuting attorneys of the State of Oregon that that was not proper?

A. There was never any such suggestion, to my knowledge.

Q. And during the course of this trial was it ever mentioned over there that Mr. Patterson was United States Attorney?

A. I believe it was not ever mentioned.

Q. And to what extent did Mr. Patterson participate in the trial?

A. He sat with me at counsel table throughout most of the trial. There were times when he was absent, and what percentage of the time he actually sat I couldn't say.

Q. Did he make any opening statement to the jury?

A. No, he made no opening statements. He did not make objections to testimony, as I recall. The

(Testimony of Edwin D. Hicks.)

only participation that Mr. Patterson did engage himself in throughout the trial was a very brief cross-examination of one witness, as I recall, a Portland police officer. That was occasioned from the fact that [79] Mr. Patterson had had some meetings with the police officer and there was some dispute as to exactly what occurred in respect to those pleadings, and I believe I requested Mr. Patterson—I don't know how that came up, but, anyway, he did cross-examine—very brief cross-examination of one witness. But, anyway, that is the only participation that he took in the trial.

Q. Was he called as a witness?

A. No, he was not.

Q. Did you contemplate, when you were working on the preparation of that case, did you contemplate that he would be called as a witness?

A. Well, we didn't know for sure, but Mr. Patterson had some knowledge of the divorce proceedings and the affections that Mr. Bowden had displayed toward his wife, and it was conceived as possible, but not for certain, that Mr. Patterson would be called as a witness. It developed that the matters that we thought might be developed were not developed, and, therefore, it was not necessary to call Mr. Patterson as a witness and we did not call him. I am quite positive that we did not.

Q. Then at the time you started the case for trial you didn't know whether you would need to call him?

A. No, we had no way of knowing, because that

(Testimony of Edwin D. Hicks.)

would depend completely on what the State might undertake to prove.

Q. Now, Mr. Hicks, you were Assistant United States Attorney for a period of three years; is that what you said? [80] A. Yes.

Q. And you were familiar with the Attorney General's manual, which reads, "In the interest of cooperation between the two prosecuting agencies and for other obvious reasons, Assistant United States Attorneys should not accept employment to defend persons charged with a crime in a State court?"

A. No, I was not aware of that provision in the manual. I am not sure that I was aware that there even was an Attorney General's manual defining duties and rights of United States Attorneys. If I ever saw the document I have no recollection of having seen it.

Q. Was it called to your attention when you went in as Assistant United States Attorney?

A. Well, I feel quite sure that it was not.

Q. When you undertook the defense of Mr. Bowden was it made clear to Mr. Bowden,—I mean by Mr. Patterson, in your presence,—did Mr. Bowden understand that you were the person in charge of his defense?

A. Well, I can't state any formal conversation to that precise effect. I think it was understood by Mr. Bowden that I was in full charge of the case, because I did most of the investigation, I had most of the meetings myself alone with Mr. Bowden, I had complete charge throughout the trial

(Testimony of Edwin D. Hicks.)

and throughout the preparation for the trial, and of course that was the understanding with Mr. Patterson that I had, that I [81] was to be the counsel on the case and to have full charge of it. I did collaborate with Mr. Patterson and had meetings with him in preparation for the trial, but I think that I had the chief and full responsibility for the defense.

Q. Did Mr. Bowden have other lawyers, other than you and Mr. Patterson?

A. No, not to my knowledge.

Q. Were you aware that Mr. Patterson's being with you in court was in violation of any rule of ethics, any canon of ethics, or any rule of propriety?

A. No, I definitely was not.

Q. So far as you were concerned, you conducted the trial in the utmost good faith?

A. I did the best I could.

Q. It is suggested to me that you yourself employed other attorneys to do some research work on the matter.

A. Yes, I did employ one attorney specially to do quite a substantial amount of research work, and Mr. Tongue, in the office, engaged himself likewise in that behalf.

Q. Who was that attorney other than Mr. Tongue? A. Gilbert Sussman.

Mr. Green: I think you may take the witness.

Cross-Examination

By Mr. Dezendorf:

Q. As I understand your testimony, Mr. Hicks,

(Testimony of Edwin D. Hicks.)

as you went [82] into the trial of this case it was expected that probably Mr. Patterson would have to be a witness?

A. It was anticipated that he might. Of course, we could not tell for sure, because they did not apprise us as to what their proof was to be.

Q. And did I understand you, also, that the question of the propriety of Mr. Patterson acting as attorney in the case was never discussed nor even considered by you?

A. Well, that is true. I did not have the slightest idea that there was any suggestion of impropriety or, of course, I would have called it to Mr. Patterson's attention and would have made arrangements that it should be removed.

Q. And it was not discussed between you?

A. No, I never heard that question raised until, I think, it was raised in this proceeding.

Q. Mr. Green asked you whether the fact that Mr. Patterson was an Assistant United States Attorney came out during the trial, and your answer was no.

A. I don't believe it did at any time.

Q. It did, however, come out in the newspaper reports which were in the papers, in connection with the case, that he was Assistant United States Attorney and was Mr. Bowden's attorney?

A. I know it was noted in the paper that he was Mr. Bowden's attorney. As to reference as an Assistant United States Attorney, I could not be sure. I have read many of those [83] items, but I could

(Testimony of Edwin D. Hicks.)

not be sure that they referred to him as that, but I assume possibly they did.

Q. When you went into the trial was it then agreed between you and Mr. Patterson that he should participate with you in the fee?

A. Yes, I think that agreement was made at the time we originally discussed the matter and a fee arrangement was made. I believe that is correct.

Mr. Dezendorf: I believe that is all.

Mr. Green: That is all.

The Court (Fee, J.): Mr. Hicks, I want to ask you a few questions. When you were in the United States Attorney's office did you appear in any criminal cases for the defense?

A. No, your Honor, I think I did not.

The Court (Fee, J.): You did that, didn't you, upon the ground that it was not proper for an Assistant United States Attorney to appear in the defense of a criminal case?

A. Well, I don't believe I had any opportunities to defend any criminal cases and I don't believe the question ever came to my mind, your Honor.

The Court (Fee, J.): You know it is not proper, don't you?

A. Well, I understand, since the question is raised here, that there is some suggested lack of ethics in that consideration.

The Court (Fee, J.): Didn't you know it?

A. No, I certainly did not. I certainly would not—— [84]

The Court (Fee, J.): Just a moment, before

(Testimony of Edwin D. Hicks.)

you answer so fast. Do you remember coming in my office, before you came to Portland, a situation where you had a letter from the United States Attorney?

A. Was this while I was in the District Attorney's office?

The Court (Fee, J.): Yes.

A. A letter from some other United States District Attorney?

The Court (Fee, J.): Yes. I will be specific. You remember when George Neuner wrote a letter to you and suggested to you that as District Attorney of the State of Oregon you did not have any business defending a criminal case in the Federal Court, don't you? A. Now——

The Court (Fee, J.): A very hot letter, too?

A. No, I think the incident that your Honor is referring to arose in this way, I think this is the only contact I had with George Neuner and with your Honor before I was appointed; That arose over a sentence that was imposed by this Court on one of our Grant County moonshiners.

The Court (Fee, J.): Yes.

A. I wrote a letter to George Neuner protesting the minimal sentence that was given that man. We had been trying to catch him for years over there and I had cooperated with the Federal officers, and when he got off with practically no sentence at all, two or three hundred dollars fine, I did write a letter to [85] George Neuner, with a copy to your Honor, protesting that result. I was then prosecut-

(Testimony of Edwin D. Hicks.)

ing over there and cooperating with the Federal officers in the investigation of that matter. Now, I don't believe there were any indications there concerning my representing anyone while I was District Attorney, because certainly I was not, and I think that was a wholly collateral matter. I don't see what your Honor is driving at here, because the question of one attorney representing another—or a defendant while he was engaged in the service of the State did not come up. Now, that is my recollection of that incident, your Honor.

The Court (Fee, J.): Do you remember the fact that it was not a protest of a minimum sentence, it was because the Court had given him a sentence that was too much and that you wanted to get him off, and that the letter you wrote to George Neuner was on account of the fact that we had given him six months and you wanted him paroled and you wrote to me about the matter?

A. Yes.

The Court (Fee, J.): And George wrote you a very hot letter in which he said that you had no business as District Attorney of the State of Oregon to interfere in behalf of a man who had been sentenced in the Federal Court? And, incidentally, I know the name of the defendant, too.

A. Just a minute,—I think your Honor is wrong in the consideration of the matter, because I remember that incident [86] specifically, and the correspondence with the Court would show that I was actually protesting the minimum sentence that that fellow got.

(Testimony of Edwin D. Hicks.)

The Court (Fee, J.): Well, incidentally, I sentenced him.

A. Well, I may be wrong, but that is my recollection of it.

The Court (Fee, J.): I tell you very definitely you are wrong, because I remember you came to my chambers at the time and I told you I thought it was improper for you to be protesting the case of a man that had been picked up here and I stated at that time what I thought was the code of ethics that applied to prosecuting officers.

A. That was the Kilgore case, your Honor, United States versus Kilgore, I am quite sure. Well, the Court may be right in his recollection of it, but my recollection is quite clear that I was disappointed that after years in trying to catch that fellow he got off without a fine after I had worked hard on those fellows over there, but I could be wrong on that.

The Court (Fee, J.): No, it wasn't the Kilgore case.

A. I may have the name wrong.

The Court (Fee, J.): It is the son of a lawyer over there.

A. A moonshine case?

The Court (Fee, J.): One of the older lawyers. I don't want to mention the name.

A. Was it a liquor case?

The Court (Fee, J.): Yes, it was a liquor case.

A. Well, I don't remember it. Really, I don't.

The Court (Fee, J.): I don't want to bring

(Testimony of Edwin D. Hicks.)

the name in this proceeding, but he was the son of one of the older lawyers in Grant County, and one of the very well known older lawyers over there. You don't remember the incident that way?

A. No, I really do not, and I don't remember meeting your Honor until I came into the United States Attorney's office. Now, I could be wrong about that, but that may be true.

The Court (Fee, J.): I am very positive about that.

The Court (McColloch, J.): Why did Mr. Patterson not take the lead in this case?

A. Well, I can give you my idea why he did not.

The Court (McColloch, J.): No, tell me the fact.

A. Well, as best I know he hadn't had very much experience at that time, he was a young fellow, he hadn't practiced much, and I assume that he was concerned about his responsibilities over in the United States Attorney's office taking up more time than he could devote to the full preparation of the case, and I think he had some confidence in my capacity to defend the man.

The Court (McColloch, J.): Now, I ask you, please, to search your memory closely and answer this question: Did you not tell Mr. Patterson that he would have to get clearance of some kind from his superior before he could properly appear over there in a murder case as a defense lawyer? [88]

A. I recollect no such conversation with Mr. Patterson to that effect. I assumed that that had

(Testimony of Edwin D. Hicks.)

been done, I suppose. Everybody knew that Mr. Patterson was representing Mr. Bowden.

The Court (McColloch, J.): What do you mean? Assumed what had been done?

A. Well, I assumed that he had obtained such clearance, if there were any questions arising in that regard. I think everybody that read the papers knew that Mr. Patterson was representing Mr. Bowden. I don't think the question came up, so far as I can recall at this moment.

The Court (Fee, J.): Well, Mr. Hicks, what do you suppose the Attorney General's manual means by saying "for other obvious reasons?"

A. That is that clause that says that counsel should not——

The Court (Fee, J.): Yes, "for other obvious reasons"—what do you think that means?

A. Well, I suppose it means that it is not ethically appropriate, if you want me to construe the language,——

The Court (Fee, J.): That is what I mean.

A. —for one to be prosecuting in one court and defending in another.

The Court (Fee, J.): And didn't you know that there has been a universal custom in the United States Attorney's office, not only when you were there but since time immemorial, that if anybody took a case in which the prosecution of a criminal [89] was involved the United States Attorney and the Attorney General would have to be notified and they would have to say that it was all right and that

(Testimony of Edwin D. Hicks.)

it did not conflict with the interests of the United States?

A. Well, I didn't know that, your Honor, and I had never seen the question raised.

The Court (Fee, J.): Well, you have heard about clearance, haven't you?

A. What do you mean? Clearance through Washington, before an Assistant United States Attorney——

The Court (Fee, J.): No, clearance by the United States Attorney?

A. Well, I have heard it since this proceeding was raised. I don't recall that it ever arose when I was in the office, because we weren't doing much of that.

The Court (Fee, J.): Well, you were acting according to ethical principles, but didn't you know that there was such a thing as a clearance if there was a suggestion that United States interests might be involved?

A. You mean that an Assistant United States Attorney should clear with his superior before engaging himself?

The Court (Fee, J.): Yes, clear with the responsible officer of the United States?

A. Well, I suppose that would be implicit, your Honor, because I don't know, I am just thinking——

The Court (McColloch, J.): Do you say now that Mr. Patterson did not tell you before that State trial began that he got such a clearance?

A. I don't think we ever discussed that. I don't think the question came up at all. I assumed that he had it, I suppose. I don't think that it did.

(Testimony of Edwin D. Hicks.)

The Court (McColloch, J.): Well, what do you mean, you assumed that he had it?

A. Well, I don't think we ever discussed that. After all——

The Court (McColloch, J.): You are not even saying that you assume now that he had. You are saying that you assumed that he had it.

A. Well, I don't know what went through my mind at that time, your Honor. I don't think we ever discussed it or considered it as a point. Certainly if we had, I, in protection to Mr. Patterson, would myself have taken some step in that direction. He was my friend, and I would not have let him do something that I did not consider was proper.

The Court (Fee, J.): Well, you know it is unethical now, don't you? A. Yes.

The Court (Fee, J.): That is all, as far as I am concerned.

The Court (McColloch, J.): That is all.

Mr. Green: That is all, Mr. Hicks.

(Witness excused.) [91]

J. ROBERT PATTERSON

thereupon resumed the stand as a witness in his own behalf and was examined and testified further as follows:

Direct Examination—(Resumed)

Mr. Green: What was my last question?

(The last preceding question and answer were thereupon read.)

Q. In referring to October 2nd, that is the date of Exhibit 12.

(Testimony of J. Robert Patterson.)

A. I myself did not know anything about the assumed name certificate, but along in October sometime Mr. Klepper discussed whether or not we should do business under an assumed name and I knew he was going to have the letterhead printed and the name on the door changed. I did not know anything about the assumed name certificate.

Q. You mean the actual time it was filed?

A. No.

Q. You had talked about it and agreed to it?

A. Yes.

Q. I believe I asked you with respect to the Costello case. Did you make any recommendation to the Court in that at all? A. No, I did not.

Q. Were you asked for a recommendation?

A. Yes, I believe the Court asked me if I wanted to make one, or something along that line, and I said no. [92]

Q. Now, when this Bowden trial started, or before the Bowden trial, what was in your mind in respect to your expectation of being called as a witness?

A. Well, it never entered my mind, but later, after Mr. Hicks and I had talked about it and after he had started to prepare the defense, he said that "It may be that the State will bring in all this stuff about the divorce case, and in that case you will probably have to be a witness."

Q. Now, in this Bowden case——

The Court (Fee, J.): May I just ask about that now?

Mr. Green: Yes.

The Court (Fee, J.): Mr. Patterson, your pres-

(Testimony of J. Robert Patterson.)

ent answer omits a portion, "although he expected to be called as a witness at the trial." I take it that you mean by your present statement of it now that at the time you took the employment that you did not expect to be called as a witness, but——

A. —I did not even consider that, your Honor.

The Court (Fee, J.): But subsequently, and before the trial,—— A. That is true.

The Court (Fee, J.): —you did expect to be called, because Mr. Hicks said so?

A. There was a possibility, yes.

Q. (By Mr. Green): Well, your statement is that there was a possibility by virtue of these divorce proceedings? [93] A. That is right.

Q. But your expectation of being called was something that depended upon what was brought out during the trial? A. Yes, it did.

Q. Now, in the Bowden trial or in the matter of having the partnership listed on the door, were you at any time conscious of any unethical conduct?

A. No, I was not.

Q. And were you at all time acting in good faith? A. I certainly did.

Q. In respect to Martin, were you acting in good faith in respect to Martin? A. Yes, I did.

Q. Who was the United States Attorney when you were appointed? A. Mr. Carl Donaugh.

Q. You served under him how long?

A. Well, until Mr. Hess was appointed.

Q. Was that six months, or a year, or——

A. I believe that that was—I think it was almost a year, maybe a little more.

(Testimony of J. Robert Patterson.)

Q. Now, with respect to all these charges that have been filed against you, was there ever any conscious, intentional or willful violation of any duty or ethical duty, so far as you knew, in your own mind? A. There certainly was not. [94]

Q. Was any client or any court ever deceived or injured by virtue of anything that you did?

A. If anything had ever been called to my attention I would certainly have corrected it.

Q. No, that does not answer my question. Was any client or any court ever deceived by anything that you did? A. I don't believe so.

Mr. Green: You may take the witness.

Cross-Examination

By Mr. Dezendorf:

Q. Talking now about the Hughes case, Mr. Patterson, you are familiar with that? A. Yes, I am.

Q. As I understand it, it became apparent very early in the case that the defense was going to contend that the United States was the proper party defendant?

A. Yes, in their answer they raised that question.

Q. Did you ever discuss with Mr. Hughes the possible advisability of his getting other counsel?

A. Well, I don't think so until after this complaint was filed against me, and then I did inform Mr. Hughes that it would be necessary that I withdraw and that if he wished to prosecute his claim further I told him when the statute of limitations would run and for him to secure other counsel.

(Testimony of J. Robert Patterson.)

Q. Well, do I understand you, then, that it was not until [95] recently that you discussed the matter with him?

A. Well, the time that your complaint was filed, yes.

Q. In this particular proceeding?

A. Yes, the original complaint.

Q. There was no discussion before that as to the possible advisability of his getting independent legal advice? A. I don't believe so.

The Court (McColloch, J.): Why did he leave it at that stage, Mr. Dezendorf? I don't understand you. He had lost the case.

Mr. Dezendorf: I understand.

The Court (McColloch, J.): What is the point?

Mr. Dezendorf: The point is that perhaps it would have been advisable, when the defense was raised that the United States was a proper party, for him to have discussed and have gotten the counsel of Mr. Hess to——

The Court (McColloch, J.): No, why was he talking to his client at the time your committee moved in, long after the case had been tried and lost on the merits?

Mr. Dezendorf: He said that he advised him if there were any further proceedings he would have to get further counsel and advised him as to the running of the statute of limitations.

The Court (McColloch, J.): What further proceedings?

A. There was a possibility of suits under the suits-in-admiralty act. [96]

(Testimony of J. Robert Patterson.)

Q. (By Mr. Dezendorf): Against whom?

A. Against the War Shipping Administration.

Q. And when did that cause of action accrue?

A. Well, at the time of the injury, if there was a cause of action.

Q. So that all the time he had in existence a possible claim against the government?

A. Well, there was that possibility. In my opinion, it was not well founded.

Q. Did you so advise him?

A. Yes, I did. I also informed him I was in the United States Attorney's office.

Q. Did you tell him he had a possible claim against the War Shipping Administration?

A. I believe I did, that there was that possibility in the situation.

Q. Did you tell him that you could not present the claim against the War Shipping Administration?

A. I think I did.

Q. But you are certain that you did not advise him to consult other counsel until this particular proceeding was filed?

A. No, I don't believe I did.

Q. I think you have already answered this in response to a question from the Court, but at the time you went into the trial of the Bowden case you anticipated that you might have to be [97] a witness?

A. There was that possibility, yes.

Q. By the way, going back for a moment to the Hughes case, whose client was Mr. Hughes, yours or Mr. Klepper's?

A. He was mine.

(Testimony of J. Robert Patterson.)

Q. Did you know about the Attorney General's manual at the time this Bowden matter came up?

A. I never knew of the Attorney General's manual, Mr. Dezendorf, until you called me on the phone that day.

Q. You had, however, seen these memorandums, these office memorandums, that went around from Mr. Hess?

A. Mr. Hess had sent memos around, and later on I found that they were excerpts from this Attorney General's manual, but I didn't know at the time I got the memorandums where they came from.

Q. Had you ever heard of clearance?

A. No, I had not.

Q. Did you discuss with Mr. Hess at any time the advisability or propriety of your representing Bowden in the State Court proceedings?

A. The Bowden case was discussed in Mr. Hess' office in the presence of Mr. Hess, myself, and Mr. Vic Harr on Saturday morning, the Saturday before the trial on Tuesday.

Q. But you had been in the case for some little time before that discussion? [98]

A. Yes, and I think 'most everyone knew that I was in it. I mean I had talked it around the office and discussed it with Mr. Harr, and I don't believe, though, that Mr. Hess had ever said anything to me or I had ever said anything to him prior to this Saturday.

Q. What was the conversation then?

A. He said at that time, "I wish you had told

(Testimony of J. Robert Patterson.)

me about this sooner, Mr. Patterson, because if you had I think I should have reported it to the Attorney General to see if I could have gotten his approval, and under the circumstances that you tell me I think that I could have secured it."

The Court (McColloch, J.): Had the trial begun?

A. No, it had not. The trial began on the following Tuesday.

Q. (By Mr. Dezendorf): Did he give you permission to continue?

A. I wouldn't say that he gave me permission, nor did he forbid me to.

Q. Where was the occasion where you took a leave of absence?

A. That was when I went in the Bowden trial.

Q. That was before this Saturday that you are talking about?

A. Oh, no, the following Tuesday I took the leave of absence. For the time I spent in the Circuit Court I took annual leave.

The Court (McColloch, J.): How did it happen that you talked to him on Saturday?

A. On the Saturday before the trial opened we sat down there and talked it over,—I don't know exactly how it came up—and [99] Mr. Hess told me something about the murder trials he had been in over in Eastern Oregon, and one of the principal defenses in the Bowden case was that a third man was involved in a family dispute, and Mr. Hess told me that that was very closely allied to an in-

(Testimony of J. Robert Patterson.)

sanity plea, I mean that the facts could be argued in a similar manner, and I discussed some of the murder cases he had over in Eastern Oregon.

The Court (McColloch, J.): You mean you brought it up generally and it developed in the talk that he thought it was proper for you to be in it?

A. No, he didn't say it was proper.

The Court (McColloch, J.): I mean that this came up casually. If you hadn't happened to be there and he hadn't happened to be there it would never have come up?

A. Well, we didn't meet down there for that purpose. I would say it came up casually. We were both there, Mr. Harr and I, and we were in Mr. Hess' office and we discussed it at that time.

The Court (McColloch, J.): Well, it just happened to be discussed?

A. Yes, that is true. I really thought, I was of the opinion, that everyone knew I was in the case. I wasn't trying to hide anything, never did.

The Court (McColloch, J.): Did he tell you then about the manual? [100]

A. No, he didn't tell me about the manual, but he did say that it might involve—he had just made a speech, I believe, before the District Attorneys' Association or something, in which part of his speech was devoted to the cooperation between the two prosecuting agencies, and he did tell me that this might involve something that there would not be that cooperation, that he had just made the speech, and it would seem funny that I would be over on the other side of it.

(Testimony of J. Robert Patterson.)

The Court (McColloch, J.): But you say you knew at that time or before that there was a manual?

A. No, I did not, your Honor. I never knew there was a manual until Mr. Dezendorf called me on the phone, and then I went in and talked——

The Court (Fee, J.): When was that?

A. That was after these proceedings were instigated. That is the first time I ever knew that there was an Attorney General's manual.

The Court (Fee, J.): When did you first hear the word "clearance," Mr. Patterson?

A. When Mr. Dezendorf called me on the phone that day—no, I don't think that is quite true, because on the Saturday when Mr. Hess and I talked it over, Mr. Hess, as I said, told me he wished that I had told him about it sooner, because he thought that under the circumstances he could have got clearance from the Attorney General.

The Court (Fee, J.): How long does it take to get clearance [101] from the Attorney General?

A. Well, I wouldn't know about that, your Honor.

The Court (Fee, J.): This was Saturday?

A. Yes, it was.

The Court (Fee, J.): The trial didn't start until Tuesday? A. Tuesday.

The Court (Fee, J.): Well, had somebody broken a leg or something, that they couldn't have wired the Attorney General's office?

A. Well, I guess that could have been done.

(Testimony of J. Robert Patterson.)

There were many facts that would be necessary to explain, I would imagine.

The Court (Fee, J.): What? That you were representing a criminal in the State courts?

A. No, the reason why, that— I had represented him in the divorce case, and that many facts represented in the divorce case would probably come up in this case.

The Court (McColloch, J.): What was this man convicted of? A. First-degree murder.

The Court (McColloch, J.): Was he executed?

A. No, life imprisonment.

The Court (McColloch, J.): It was charged, wasn't it, that he blew his wife up in a furnace?

A. No, that is not correct?

The Court (McColloch, J.): Wasn't that the case?

A. No, the charge was similar, your Honor, but the bomb was [102] stored in a foot locker in the basement and the bomb didn't go off when anyone had opened the locker. It was in a separate box inside the foot locker and had a padlock on it, and that night, the divorce case was pending, she went down and got into the foot locker with an axe and got this small package, and when she opened this small package it went off. Small bomb was inside the small package inside the foot locker.

The Court (McColloch, J.): Well, that is what the State charged him with, that he blew his wife up with a bomb? A. Yes, they did.

The Court (McColloch, J.): Which he set for that purpose? A. Yes, they did.

(Testimony of J. Robert Patterson.)

The Court (Fee, J.): Well, as I understand it, you now say that Mr. Hess gave you advice as to how to defend this case?

A. I wouldn't say that, your Honor.

The Court (Fee, J.): Well, it sounds very much like it, doesn't it?

A. It was talked over. That matter was discussed.

The Court (Fee, J.): And he told you what line to take in defense, is that it?

A. I don't think that I would say that he advised me directly how the defense should be conducted, no. He said that he had had similar cases over in Eastern Oregon. He gave me no advice as to how our trial should be conducted.

The Court (Fee, J.): He said he was sorry, but he helped you out, is that it?

A. Pardon?

The Court (Fee, J.): He said he was sorry that you were in it, but he helped you out?

A. He helped me out?

The Court (Fee, J.): Yes, by giving you some hints as to how to conduct the defense?

A. Well, that might be true, your Honor.

Q. (By Mr. Dezendorf): May I refresh your recollection? Wasn't the time I called you before the complaint was filed, but on the occasion when I asked you if you wanted to voluntarily appear before the Committee and make a statement?

A. That is correct. I am sorry. Right before the hearing, that is correct, the first hearing.

Q. Did you consider yourself a special or lim-

(Testimony of J. Robert Patterson.)

ited partner with Mr. Klepper or Mr. Brown at any time?

A. Well, I never considered myself a partner. Since the question was raised I started looking back on the situation as to what the facts were, but I can't say now that I really felt I was a partner. No, I can't honestly say that, but maybe, in a sense of the word, I was. Certainly I was not a general partner, that is true, certainly, no question about that.

Q. Well, did you ever consider yourself a special or limited partner with Mr. Klepper and Mr. Brown? [104]

A. Well, you mean in my own mind?

Q. Yes.

A. Well, I considered myself this way, Mr. Dezen-dorf, I might answer your question this way, that if we didn't take any income in down there I wouldn't get any money. I mean I devoted myself to his work and he devoted himself to my work, and if there was any lack of income I was certainly trying to—it was certainly going to result in my disfavor, in that I wouldn't have that money to——

Q. You mentioned a firm name, did you not?

A. Yes.

Q. You were aware of the fact that you were practicing under what is commonly known as a firm name?

A. Yes, that is true.

Q. Did that indicate to you that you were holding yourself out as a partner of those other two gentlemen?

(Testimony of J. Robert Patterson.)

A. Well, really, to be honest with you, I never considered it at all.

Q. Didn't give it any thought?

A. Not very much.

The Court (McColloch, J.): Was Klepper wrong when he said you were getting fifty dollars a week before you came up here?

A. Yes, that is right, before I came up here I was getting fifty dollars a week.

The Court (McColloch, J.): Then, what salary did you get [105] as Assistant United States Attorney?

A. Thirty-eight hundred, I believe, your Honor, a year.

The Court (McColloch, J.): Other than your fifty dollars a week being cut off, your other arrangement continued the same as before with the Klepper organization after you came up here?

A. Yes, that is true. Of course, I could not do as much work as I had done before, but the same situation was still the same.

Q. (By Mr. Dezendorf): Did any impropriety occur to you when you were on one side of the Costello case and Mr. Klepper was on the other?

A. No, it did not. If it had, I would have stepped out and had someone else take the matter up to the Court, or something like that.

The Court (McColloch, J.): You gave Mr. Klepper's name to Costello's aunt as one of several attorneys that he might go to, didn't you?

A. Yes, one of several. Yes, I did, your Honor.

(Testimony of J. Robert Patterson.)

Mr. Dezendorf: May we have the Costello file, please, Mr. Clerk?

Q. In a criminal case pending in the Federal court, who ordinarily prepares the order releasing the bail? A. Who ordinarily what?

Q. Releasing the bail?

A. Ordinarily? Oh, I think the defendant's attorney would ordinarily do that. [106]

Q. Do you remember who did it in the Costello case?

A. Well, there is a possibility that I may have.

Q. As a matter of fact, you did dictate it down in your office and it is on United States Government paper, isn't it?

A. Well, if it is there I did it. I will say this, too, Mr. Dezendorf, this isn't the first time. We have done that many times.

Q. Was Mr. Klepper in your office when you dictated the order?

A. I can't say. I wouldn't know.

Mr. Dezendorf: Will you show this order to the witness, please, in case 16714.

A. Many times, Mr. Dezendorf. I might say that where the person is put on probation he ordinarily goes directly to the Probation Office and makes arrangement with the Probation officer and the Probation officer brings him over, many times, and says, "Get an order releasing this person's bail," and I have prepared many of those, many of those orders, where they have been represented by other counsel.

(Testimony of J. Robert Patterson.)

Q. In this case, however, you did that for Mr. Klepper, didn't you?

A. No, I didn't do it for him. I did it for Mr. Costello. Mr. Costello got his money, and he was the one that wanted it.

Q. Did you actually see the money handed over?

A. No, I did not. I had nothing to do with that.

Q. Do you recall what you did with that order after you prepared it? [107]

A. Well, when I prepared the orders I just left them here with the Clerk.

Q. No possible question of impropriety entered your mind of Mr. Klepper being on one side and you on the other?

A. No, there did not. No, there was not. I think I might say that I realize now that it might be the subject of criticism, I do, but here was a situation where the defendant was going to plead guilty; that was all there was going to be to do. I really didn't think much about it, to tell you the truth, and I certainly didn't feel conscious of any impropriety at the time I took Mr. Costello up. If I had I would have had Mr. Harr or one of the other boys take him up.

Q. Do you think that would have been proper?

A. No, now I don't think that would have been proper either.

Q. What should have happened?

A. I imagine Mr. Costello should have got another attorney if he wanted one.

Mr. Dezendorf: I think that is all.

Mr. Green: I think that is all.

(Testimony of J. Robert Patterson.)

Mr. Hess: I would like to ask Mr. Patterson a few questions, if I may, your Honor. You stated, Mr. Patterson, that there had been discussion on different times in the office about the Bowden case prior to this Saturday that you speak about before the case came on for trial?

A. Yes, I had talked to Vic about it, and I think to Mason, too. [108]

Mr. Hess: Well, you had talked it in the office? There had been some talk about the case, had there?

A. Yes, there had.

Mr. Hess: And I will ask you this question, if during one of those conversations the suggestion did not come up and I suggested—I don't know the time of this, but some time prior to this Saturday—that he may have been insane when he touched this bomb off?

A. I think that was on a Saturday.

Mr. Hess: Now, then, as a matter of fact, then I told you about a case that I had been in in Eastern Oregon where a man had—in an eternal triangle case, where a defense was used of that kind, of insanity?

A. Yes, that is right.

Mr. Hess: Now, Robert, at that time I didn't know, did I, in any respect that you were representing Bowden in that case?

A. Well, I certainly was of the impression that you did, Mr. Hess. I really feel now——

Mr. Hess: You had nothing to make you feel that I knew anything about that you were in that case at that time, did you, other than that you were talking about the case around the office?

(Testimony of J. Robert Patterson.)

A. That is how you and I and Vic happened to be discussing it, because I was going over on a Tuesday to take part in the defense of Mr. Bowden. [109]

Mr. Hess: Well, do you know of me knowing before something about the Bowden case or that there had been some talk of it?

A. I don't think—no, I had never discussed it with you, Mr. Hess, prior to this Saturday.

Mr. Hess: Well, at least you know this, that was the time that you know that I knew, whatever this conversation was, whether it was the Saturday before or shortly after the trial was commenced, at least at that conversation that you refer to the question was raised that you were going to be in that case? A. That is right.

Mr. Hess: Were going to be over there during the case? A. That is right.

Mr. Hess: At least, that is a fact, is it not?

A. Yes, it is.

Mr. Hess: Now, then, at that time, Mr. Patterson, you agreed with me that you would take no active part whatsoever in that case, did you not?

A. Well, I don't know what you mean by "active part." I told you that Mr. Hicks had complete charge of the defense, yes, and I was just going to sit at the counsel table.

Mr. Hess: Yes, you told me that is all you were going to do. A. Yes.

Mr. Hess: And I told you definitely to take no active part in that case. [110]

A. I believe you did.

Mr. Hess: Yes. A. Yes, I believe that is true.

(Testimony of J. Robert Patterson.)

Mr. Hess: And I did tell you there Mr. Patterson, that you should have cleared this matter with the Attorney General.

A. I think this was the way: You said, "I wish, Pat, you had told me sooner, so that we could have cleared it with the Attorney General. I think that, under the circumstances, we would have got clearance."

Mr. Hess: You were informed that the Attorney General would have to be informed of all these facts?

A. Yes, I was.

Mr. Hess: I told you that?

A. Yes, you did.

Mr. Hess: That he would have to know all about this?

A. Yes, you did.

Mr. Hess: You state there that the bulletin was not mentioned as a bulletin. In these little excerpts or these memorandums that I would send out to the various attorneys in the office, when I made a quotation like that I would state that it was quoted from a bulletin, wouldn't I, designated as U. S. Attorneys' bulletin?

A. Well, I think in instances that is true, yes.

Mr. Hess: I will ask you if you know and have found out since whether or not that bulletin was a very recent thing in [111] the office—or manual, rather? I don't mean bulletin. I wish to change that.

A. Yes, I think that is a recent thing.

Mr. Hess: And it had never been sent to our office until after—well, until some considerable length of time after a United States Attorneys' conference in Washington, D. C., in 1946?

(Testimony of J. Robert Patterson.)

A. I think that is true.

Mr. Hess: Do you know when we received that or when there was any acknowledgment, or have you found out since whether or not there was an acknowledgment, of that manual in the office? If you haven't looked at it——

A. No, the only thing I can remember is that I remember when Mr. Hahner came that you gave him a bulletin and said, "Take it home and read it." I think it was shortly before that that it arrived, but I am not sure about that.

Mr. Hess: You don't think, however, do you Mr. Patterson, that there was any talk, that is, this Saturday that you are talking about, about any case that I had ever represented anybody in insanity?

A. No, in murder cases over in Eastern Oregon.

Mr. Hess: Well, in other words, I had talked to you long before this Saturday about that, had I?

A. Well, I think we had had other discussions about that, but we were particularly talking about this Bowden case on this [112] Saturday.

Mr. Hess: Yes, but that was prior to this Saturday, that was some considerable length of time before you ever went over to the trial of the case, hadn't you mentioned that you had been attorney for Bowden in this divorce case?

A. I can't say for sure. I know I had talked to people in the office. I talked to Vic, I know, and I may have talked to you, before Saturday. I couldn't say for sure——

Mr. Hess: Referring back now to our conference on this Saturday, didn't I appear to you to

(Testimony of J. Robert Patterson.)

be alarmed that you were going over as defense counsel in that case, that you were mixed up in a murder case, and that I had known that you had been his attorney in the divorce proceeding before, according to conversations that had been made around the office?

A. I can't say that you were alarmed, Mr. Hess. I really can't say that.

Mr. Hess: I didn't like you going over there, did I, and I cautioned you very much not to take any active part in the case?

A. You told me not to take any active part, and you also told me you wished I had taken it up with you sooner so we could have taken it up with the Attorney General.

Mr. Hess: And I told you it would have to be taken up with him? A. Yes, you did. [113]

The Court (McColloch, J.): Did he read you this paragraph of the manual?

A. No, he did not. I still didn't know of any manual at that time, and I might say, too, that even at that time, on Saturday, and on Tuesday morning when I went over in the Bowden case, I didn't feel conscious that I was violating any ethics.

Mr. Hess: I will ask you if you know of this now, whether you knew it then, whether or not I had asked various attorneys in the office, assistants, to read that manual, when it first came out?

A. Well, I had never heard of it, Mr. Hess.

Mr. Hess: Well, didn't you know——

A. I know now that subsequently you certainly have, when Mr. Hahner came.

(Testimony of J. Robert Patterson.)

Mr. Hess: I will ask you this question, too, whether or not you know that Mr. Harr had had that thing on his desk prior to this time, and I had given instructions to different members that that was never to leave the office over night, but the members should make themselves acquainted with it?

A. I am honest when I say that I never knew there was an Attorney General's manual.

Mr. Hess: But you don't know what happened with reference to the other men in the office, the Chief Assistant in the office?

A. No, I don't. [114]

The Court (Fee, J.): Can you tell us when the manual was put out?

Mr. Hess: Well, your Honor, I can't tell you exactly, but I can tell you the date of the letter where we acknowledged receipt of it,—August 15, 1946.

The Court (McColloch, J.): When was this case tried?

A. This was December, 1946, just a year ago now.

The Court (McColloch, J.): Well, I can tell all of you that there were instructions in the United States Attorney's office to this same effect, whether under the name of a manual or not, before Mr. Hess ever became the United States Attorney, because deputies had discussed it with me at times during the past ten years, before you came up here.

Mr. Hess: Your Honor, I think there was a United States Attorney's manual put out some

(Testimony of J. Robert Patterson.)

time in October, 1929. I don't believe that manual had ever been revised. I have looked it over since this matter came up. I don't believe that has been revised since 1929.

The Court (McColloch, J.): Two deputies before you became United States Attorney have told me that they knew that there was this prohibition against United States Attorneys practicing in criminal cases in State courts.

Mr. Hess: That may be, your Honor. I know that this manual was made in that day to United States Attorneys and Marshals, and maybe to someone else. I don't know anything about the form of the manual.

The Court (McColloch, J.): I don't care anything about the form. There was a prohibition in one to the Assistant United States Attorneys, because they have told me so.

Mr. Hess: Well, I don't know anything about that.

The Court (McColloch, J.): Well, I am advising you now, so that there may be no mistake about this date in 1946 being a new promulgation made in 1946. That is not correct.

Mr. Hess: Well, if your Honors please, I never made any such statement, if you are referring to me.

The Court (McColloch, J.): I am not referring to anybody.

Mr. Hess: I am just stating when this manual came into our office, but, as to previous manuals, there may have been manuals all during the period

(Testimony of J. Robert Patterson.)

since there was an Attorney General; I don't know.

The Court (McColloch, J.): Do you mean, Mr. Hess, that you didn't know there was a manual before August, 1946?

Mr. Hess: I knew there was such a manual, yes, sir, I did. I knew that there was a manual in October, 1928, an old manual.

The Court (McColloch, J.): Were you familiar with it?

Mr. Hess: I was familiar with portions of it.

The Court (McColloch, J.): Doesn't that contain this same prohibition?

Mr. Hess: I think it is similar. Now, I can't say that it is in the exact language, but it is a similar provision, [116] yes, sir.

The Court (McColloch, J.): I have no doubt that it is.

Mr. Hess: It may have been little used. I don't know about that. I know when I came into the office I started to inform myself as to the provisions of the manual and I knew of things going over my desk that were against that manual and that is why I issued these statements, and I want to state here for the record that I had told, perhaps not all of the lawyers in the office, but intended to inform them, about that manual, that it was there, and of course it is quite a lengthy book, lots of instructions in the manual.

Mr. Green: I think that is all, Mr. Patterson.

Mr. Dezendorf: That is all.

(Witness excused.)

Mr. Green: Call Mr. Twining. [117]

EDWARD B. TWINING

was thereupon produced as a witness in behalf of J. Robert Patterson and was examined and testified as follows:

The Clerk: Your name is Edward B. Twining?

A. Yes, sir.

(The witness was thereupon duly sworn.)

Direct Examination

By Mr. Green:

Q. You are a lawyer? A. Yes.

Q. One of the Assistant United States Attorneys? A. That is right.

Q. Are you Chief Deputy?

A. I am now.

Q. How long have you been in the United States Attorney's office?

A. I came there in 1939 and was there until May of 1942, was in the army for three years and came back in 1945 and have been there since.

Q. How long have you been admitted to practice, Ned? A. Since 1936.

Q. You are a graduate of what school?

A. University of Oregon and Northwestern College of Law.

Q. Now, Ned, in your position as Assistant United States Attorney, are you familiar with the method that the office has [118] had with respect to handling of claims for seamen where money had been paid into the Clerk's registry?

A. Yes, I am familiar with it.

Q. Well, would you go back and tell us what the custom was, say, two years ago, what the practice was?

(Testimony of Edward B. Twining.)

A. Well, ever since I have been in the office, with the exception of the time I was away, we had evolved a practice here of helping these seamen. They would come in periodically. We would help them with their affidavits and their petitions, and in no instance in my own experience, I am quite sure there is none, did we ever have any protests from interested parties, that is, from the Shipping Commissioner or the vessel owners, consequently, the thing ran smoothly and we merely appeared *ex parte* and there was no contest of any kind or no opposition of interest. I had some doubts about that whole thing. The first one I ever experienced I remember well. I was in the office alone, just new there, and Dillard and Donagh were away, and I had great misgivings about the thing. I found that that had been the policy, and was, and so ran along with it. Since we had no contest, it never came to my attention particularly, but shortly after the turn of the year in 1947 these Shipping Commissioners and shipping companies apparently thought it was time to stop the post-war desertions, or something, because for the first time they began to log these sailors and they protested their payment, and just about coincident with the time that this [119] matter came up here, I think on March 24th, a sailor came in, and I checked with the Shipping Commissioner and with the steamship company and they informed me that he was logged as a deserter and was a willful deserter. I thereupon went to the court immediately and stated my doubts, that I thought we were an

(Testimony of Edward B. Twining.)

antagonistic party and were carrying water on both shoulders, and on that point of view refused to represent the sailors. These seamen would come in and, of course, if you talked to them at all, they might tell you the whole score,—they would pretend to miss the boat or something, and I was afraid we would get into it and I felt that we were there, our purpose as United States Attorneys, to secure forfeiture of this money if they were willful deserters.

The Court (McColloch, J.): Mr. Green, I want to make something plain to you for myself. The point about the Martin case with me is not that he was a sailor. It is that he was a parolee. I don't think that any Government officer has any right to make money off of Federal probationers or parolees that come within their ken in the ordinary course of their official business. The sailor angle of it, to me, is entirely unimportant in the Martin case.

Mr. Green: Well, the matters that are—the charge is, your Honor, “offered to represent one Joseph Martin for a fee in connection with proceedings to procure the release of certain wages earned by the said Joseph Martin which were [120] deposited in the registry of the United States District Court at San Francisco, California.”

The Court (McColloch, J.): It states that he was a parolee, doesn't it?

Mr. Green: I will read the full paragraph.

The Court (McColloch, J.): Doesn't it say that?

Mr. Green: No,—“although said Joseph Martin

(Testimony of Edward B. Twining.)

was referred to him in his capacity as Assistant United States Attorney and such matters are customarily handled by United States Attorneys without compensation therefor."

The Court (McColloch, J.): Well, you know that he was a parolee. You know it now.

Mr. Green: Why, I know it now, yes.

The Court (McColloch, J.): And Mr. Patterson knew it at the time.

Mr. Green: Mr. McFarland brought him in, but the charge we are called upon to face here is the charge that we asked this man to pay a fee, and the——

The Court (McColloch, J.): And the gravamen of it to me is, not that he was a seaman, it is that he was a parolee, whether he was a seaman or what it was. It just happens that he was a seaman and had some money.

Mr. Green: I will say this with respect to that, if this is going to be considered from that standpoint it is an entirely new charge—— [121]

The Court (McColloch, J.): Then you had better prepare to defend it and take more time.

Mr. Green: I would suggest that an amended complaint be filed, so that we know just what the charge is. Now, how can we meet a situation—because we had no knowledge of it before. We knew he was a parolee, that is true, because Mr. McFarland brought him in, but certainly there was no answer to it that he was a parolee. There were no pleadings brought up on it.

The Court (McColloch, J.): It is because you

(Testimony of Edward B. Twining.)

were a very able lawyer and I knew you might say just what you have just said that I told you what I did, so you wouldn't say that you were taken by surprise at the end of the proceeding.

Mr. Green: I suggest now that an amended charge be filed and that we be permitted to answer, and that we be permitted to consider it from that standpoint, because this is the way it was referred to me.

The Court (McColloch, J.): Judge Fee has charge of the procedural end of it. He may discuss that with you; I don't know.

The Court (Fee, J.): As far as I am concerned, I will consider the charge as laid.

Mr. Green: I beg your pardon, I didn't understand your Honor.

The Court (Fee, J.): As far as I am concerned, I will consider the charge as laid. Proceed. [122]

Mr. Green: All right. Then may I inquire from the court reporter how that last portion of Mr. Twining's testimony reads,—or do you know just what you were talking about?

A. I think so. When this sailor came in and I was informed that he had a charge laid against him by the Shipping Commissioner and the log-book and the shipping company, I went to see Judge McColloch and informed him of my doubts. Judge McColloch appointed an attorney for him, and from that time forward that has been the procedure followed. That was about the 25th or 26th of March. I immediately wrote the Attorney General stating my doubts about the whole situation. I did

(Testimony of Edward B. Twining.)

not get an answer, however, until June 12th, somewhere in that time, and they then informed us that they considered our duties as United States Attorneys incompatible as representing a seaman in any respect. That matter was conveyed to the Court, and, as I say, since March, I think the last week in March, every case thereafter has been handled by appointment of an attorney or private attorney and we have proceeded as an antagonistic party since the last of March.

Q. Representing the United States of America?

A. That is right.

Q. And it has been your practice, it is your practice now, under the law, that you attempt to get the Court to do what with this fund? Where does the fund go?

A. If we have proof or reason to believe from the evidence [123] that the man is a deserter, it is our endeavor to secure that fund into the general treasury of the United States. I believe it is devoted to charitable work among the Seamen's Union, or something of the kind. But, anyway, our endeavor is to oppose the order granting the sailor his wages and effects deposited in court.

Q. Well, then, as I get the picture now, Ned—or, let me ask you, first, do you have any knowledge of how this practice came about in the first instance of the Attorney General or the United States Attorney in this district representing and actively appearing before the Court on behalf of the seamen?

A. Well, as I say, to the best of my knowledge,

(Testimony of Edward B. Twining.)

I don't think we ever had a contested case or any suggestion that the man was a deserter. Furthermore, the seaman is more or less of a privileged character in Federal Court. I believe he is entitled to appear, and, because of the nature of his duties and his trenchant status as a seaman, no doubt has led to a great deal of confusion in the Court. I believe this Court evolved the policy of our office assisting him to prepare his documents and secure his money, for that reason, but there was so much confusion about it and there was never any contest about it, and I don't think it ever occurred to anyone—the amounts were always small, in my experience, probably a hundred and twenty-five or a hundred and forty at the outside—I have handled many of them, and they all went off in the same order. [124] We cleared the decks with respect to all possible opposing parties, they said no, no objection to his getting his money, and we cleared his money. I think that policy was evolved to keep things moving and to avoid confusion. It took an opposing interest expressed to wake me up completely on it, in the first instance I know of anyone charged as a deserter.

Q. If Martin had come in to you at that particular time—this is alleged on or about the 12th day of February, 1947—what would you have done?

A. I would have told him I couldn't help him. I would have told him to go to San Francisco or to contact the United States Attorney at San Francisco or get his own attorney.

(Testimony of Edward B. Twining.)

Q. You were with Bob Patterson in the office for how many years?

A. Well, since he came in '45.

Q. How did you find him with respect to his ability to carry on work, to do work, to carry his part of the load?

A. Well, in that respect, I think he was probably very exceptional. He was very industrious and energetic. He seemed to always be willing to accept more work and more work. I never heard him kick about it. I thought he had too much work. He had a faculty of taking an armload of files and getting to the bottom of it and plunging along with it. I think in that respect that he was a remarkably fast and efficient worker.

Mr. Green: I think you may cross-examine.

Mr. Dezendorf: No questions. [125]

The Court (Fee, J.): How much money have you made off of this, Ned?

A. Off of what?

The Court (Fee, J.): Charging seamen fees for collecting money for them?

A. Well, I have never had a situation like it, your Honor.

The Court (Fee, J.): These boys that you represented in this court, you didn't charge any money for it?

A. No.

The Court (Fee, J.): Wouldn't that make some difference in your mind?

A. A difference in my mind?

The Court (Fee, J.): Wouldn't that make a

(Testimony of Edward B. Twining.)

difference in your mind, if you offered to charge one of these seamen a fee—

A. In this court?

The Court (Fee, J.): If a seaman was referred to you for getting a fund back from San Francisco, would you offer to charge him a fee?

A. No, I wouldn't, your Honor, but I think in fairness to Mr. Patterson in this case, really, my feeling is different than his, because, out of excess of caution, perhaps, I wouldn't want anything to do with it at all, if I understand your Honor's question.

The Court (Fee, J.): Yes. In other words, you act on ethical principles. [126]

A. Well, let's say again, in honesty, your Honor, if that is an indication that I think that his conduct was unethical in that case, I think that he was misled, and I don't understand from the facts in this case, I don't understand and haven't since the outset of this case, that Patterson offered to do this for a fee. I don't believe that, and I never thought that. I thought that he was using the thing more as an example when it came to that phase. I may be wrong, but I know Patterson was very badly crowded and worked too fast, he was impulsive. I was worried about it. He took off down the alley in a hurry lots of times, and, therefore, when I talked to him first about this thing I got the impression, I thought that Patterson was saying to this fellow, "This is what I would have to do." I don't think he ever dreamed that the man would come back. I think he did everything he could to

(Testimony of Edward B. Twining.)

kick him out. In short, if I make myself clear, I have had people in there many times, some of them are hard to make understand, like in these veterans' situations, we would have to represent them here—I can't do it, when they come in from another state, I can't tell them what we would have to do. I would say, "I would have to charge you three hundred dollars", never intending to do it.

The Court (Fee, J.): Well, now, you never have been criticized by this Court, nor has the Court ever indicated that the Court's own policy was improper in allowing the United States Attorney's office to represent these seamen, who are [127] assumed to be wards of the Court, during the period when there was no contest. A. That is right.

The Court (Fee, J.): And it was only when you very properly brought up the case with Judge McColloch and said that you thought there was a conflict of interest because there was now a contest that this Court then changed its policy and, in accordance with the policies you suggested, thereafter handled seamen's cases in a different manner.

A. Yes.

The Court (Fee, J.): And neither of the Judges of this Court have ever criticized that policy.

A. No.

The Court (Fee, J.): And, whatever the interpretation of the facts—I am not stating what my interpretation of the facts is now—but there is a vast difference between charging a seaman a fee for getting money for him and acting for him as an officer of the Court, in your mind?

(Testimony of Edward B. Twining.)

A. Yes.

The Court (Fee, J.): Yes, of course. That is all.

Mr. Hess: There is one question I would like to ask Mr. Twining along this line.

Mr. Green: All right, go ahead.

Mr. Hess: I will ask you if this isn't a fact, Mr. Twining, that after this matter relative to the charge against Mr. [128] Patterson had come up along this line, if this matter was not taken up and discussed with the Attorney General's office as to whether or not it was proper for us to prepare complaints in behalf of seamen and appear on behalf of the seamen here in court?

A. Yes, I testified to that, that the Attorney General finally answered our letter and stated that our duty as United States Attorneys was incompatible with any attempt to represent a seaman in respect to the matter of his wages or matters on deposit in the Court.

Mr. Hess: That is all.

Mr. Green: Q. As I get it, what the Attorney General said, he said that the law said that you were an antagonistic party?

A. That is correct.

The Court (Fee, J.): I make, in that regard, the same statement that Judge McColloch has made: There is no criticism by either of the Judges or by this Court on the policy of the United States Attorney of bringing the seamen into Court and asking for any money that was on deposit during the time when there was no contest filed here either

(Testimony of Edward B. Twining.)

by the United States or by the Shipping Commissioner, because they were assumed to be wards of the Court and the Court placed them under the aegis of its protection, so that is not in question, and, in so far as that is concerned, Mr. Patterson was fully justified in acting for those personally, but the point about it is whether [129] he offered to charge him a fee. That is a question of fact.

Mr. Green: Which we, of course, deny.

The Court (Fee, J.): Yes, I understand.

Mr. Green: Which we, of course, deny, and we are charged with saying that we wanted a fee when the matter had been customarily handled without compensation theretofore.

The Court (Fee, J.): That is correct.

Mr. Green: I think that is all, Ned. Wait just a minute. Just one question, Mr. Twining: Was it ever the policy of the United States Attorney's office to represent seamen, even when you were appearing for them before the Court, to represent them in San Francisco or in Seattle or in other places?

A. No, we never had such a case, I am quite sure.

Q. You would do it locally here?

A. That is right.

Mr. Green: That is all.

(Witness excused.)

Mr. Green: That is all our testimony, your Honors.

Mr. Dezendorf: That is all. One thing I didn't mention before. I don't know whether the Court has the Rules of Professional Conduct which were adopted by the Oregon State Bar. They are very closely akin to the Canons of Ethics of the American Bar Association. I will hand those up with the briefs.

The Court: There has been a lot of chat about the Attorney [130] General's manual. Is a copy of that submitted?

Mr. Dezendorf: No. As far as I know, it is not available to me. I asked for it.

The Court (Fee, J.): Is it available to the Court?

Mr. Hess: If your Honors please, I didn't get that question. The Court's voice was a little low for me.

The Court (Fee, J.): I say, is there a copy of the Attorney General's manual available for the Court?

Mr. Hess: If your Honor please, yes, your Honor, I have the Attorney General's manual in my office and your Honors are entitled to it any time that you desire.

The Court (Fee, J.): All right, I hope that during the course of the consideration of this case when I send down for it I can have it.

Mr. Hess: Yes, your Honor.

Mr. Green: Now, does that apply to us? May we see it?

Mr. Hess: Yes, but at the office. I regard that as confidential matter between the Attorney General and the United States Attorneys. There are

many things that are confidential in that manual. I wouldn't want it to go out to law firms. I wouldn't want it, under any circumstances, wouldn't allow it to go out to an attorney's office, but as between the Court and the office I think that is proper.

The Court (Fee, J.): All right, I will waive that, if there is objection. [131]

Mr. Green: Well, your Honor, if there is something that is going to be before the Court, I ought to have some way of knowing what it is.

The Court (Fee, J.): Well, as I say, I will waive that.

Mr. Green: Although I am perfectly willing to go to Mr. Hess' office, but from the statement he has made that it is confidential matter I don't think I should be permitted to see it.

The Court (McColloch, J.): Well, the pertinent part of it is admitted in the pleadings.

Mr. Green: I didn't understand.

The Court (McColloch, J.): I say, it is admitted on the pleadings, the pertinent parts.

Mr. Green: Well, we quote pertinent parts of it, yes.

The Court (Fee, J.): As I say, I won't call for it.

Mr. Hess: I might state that that portion is correctly quoted by the defendant.

The Court (Fee, J.): All right.

Mr. Green: We rest.

The Court (Fee, J.): What do you want to do about submission?

Mr. Green: Well, your Honor has indicated that

you do not think the law is involved in this situation. Of course, I disagree with your Honor on that point.

The Court (Fee, J.): I didn't mean that there isn't any [132] law involved in this case, but I mean that an argument of law as to whether one of the parties in an admiralty case in the Supreme Court or some other prevailed in a particular situation has, in my mind, very little to do with it. I think the only thing that is involved there is the attitude of Mr. Patterson. I think the only thing that is involved is his mental attitude.

Mr. Green: Well, I think, of course, that what decisions have been rendered might throw some justification upon what his mental attitude was, and I would like to submit to this Court a brief, also, on this question of the special or limited partnership, because I very frankly tell you until I got into this case I didn't know that such a thing existed with respect to legal practice, but I find that there are a great many cases in Federal and State courts where that is recognized and that question is involved, and I think that becomes very important, so I would like to, I think, submit a written statement to this Court, and then after those papers are submitted I would like to have the matter argued before the Court and I would like to make a presentation on it.

The Court (Fee, J.): Well, I certainly am not going to deny you the right to make a presentation on it.

Mr. Green: I would like to have—of course, the holidays are coming on, it is pretty hard to get up

a brief right at this time, and I don't want to ask any excessive time, because we haven't any disposition to delay the case. It was delayed [133] from a certain time in November because I was out of town, and we asked—I simply remind your Honor that we asked, in June or July sometime, that we be given a hearing; your Honor will recall I was before the Court with Mr. Dezendorf and we asked at that time to get a hearing, and we were not notified until the 29th, I believe, was the first date, that we would be heard—I believe I am right on that. So we haven't been responsible for any delay on this hearing, I don't think. No, I think there was a date given us earlier, in November, for the 13th, and I was going to leave town and I did ask for further time, so we are responsible for that much postponement.

The Court (Fee, J.): Well, I am not disposed to criticize you on that. I realize that the Court was not in a position to take up the matter at the time that you requested it, and I am not charging you with any delay. I realize that your engagements subsequently became such that you had to be granted a postponement, and the Court was very glad to grant it, and the Court will now give you such time as you wish to make the presentation, and I might say that if you wish to make any argument upon the question of these admiralty cases, why, of course the Court will hear you.

Mr. Green: Well, what I would prefer, that I submit a brief, and if Mr. Dezendorf desires to answer it that he submit a brief, then the matter

be argued before the Court when you have the briefs in your hands then. I would prefer that, rather than [134] argue it and submit the briefs later on.

The Court (Fee, J.): How much time do you want to submit the briefs?

Mr. Green: Well, Christmas is almost here. I would like until sometime about the 20th of January. I would like to have two or three weeks after New Years.

The Court (Fee, J.): What time in January?

Mr. Green: I said about the 20th. I am requesting that.

The Court (Fee, J.): Mr. Dezendorf, what do you desire to do?

Mr. Dezendorf: It is immaterial to me, your Honor. Anything that is agreeable.

The Court (Fee, J.): All right, can you prepare a brief to be submitted approximately simultaneously, if you wish to brief your side of it?

Mr. Dezendorf: Yes.

The Court (Fee, J.): All right, each side will submit a brief on the 20th of January, and at that time I will set the case for presentation on the 22nd at 10:00 o'clock. I do not want to burden you now, Mr. Dezendorf, if there is any date that is here suggested that does not meet your convenience.

Mr. Dezendorf: That is perfectly all right.

The Court (Fee, J.): Are there further matters now, gentlemen? Court is now in adjournment until tomorrow morning at 10:00 o'clock. [135]

(Whereupon, at 5:40 o'clock p.m., Friday, December 19, 1947, oral testimony and proceedings herein were concluded.) [136]

Monday, June 28, 1948, at the hour of 4:10 o'clock p.m., further proceedings herein were had before the Honorable James Alger Fee and the Honorable Claude McColloch, Judges of the above-entitled Court, as follows:

The Court (Fee, J.): In the matter of J. Robert Patterson, the Judges of the Court referred the matter to the Committee on Discipline, and they have returned a report which is signed by David Lloyd Davies, Samuel H. Martin, Robert A. Leedy and James C. Dezendorf, recommending that J. Robert Patterson be permanently disbarred and his name stricken from the roll of the attorneys entitled to practice in this Court. The matter is now for final submission.

Mr. Green: Your Honors, we haven't any argument to make to this Court. There hasn't been anything that has been presented to you that has changed our minds from what we have presented to the Court in the brief. The only thing that we can say, that I went over this brief again today and I went over the testimony again today—the only thing that I can say, that there is no element of willful misconduct, that there is no element of willful turpitude, moral dishonesty, there isn't anything in any of these charges, or any of those allegations, that justifies disbarment, and I think that the matter has been fully presented to the Court—at least, we attempted to in our brief, and

I know that the Court [137] has been over that and I don't know of anything that I could add. If the Court has any questions they want to ask, I would be very happy to answer them if I am able to do so.

The Court (Fee, J.): On that basis, the Committee having made the report, the Court at this time adopts the report and directs the Committee to formulate findings of fact and conclusions of law and enter a form of order of disbarment.

At this time the Court enters an order of disbarment and strikes the name of J. Robert Patterson from the roll of attorneys. The findings and order will be entered of record when they are finally formulated.

Mr. Green: Well, will there be an order entered on this statement that your Honor has just made that his name is stricken from the bar of the Federal Court— When will that formal order be entered?

The Court (Fee, J.): The Committee is directed to formulate findings to establish the basis upon which the Court acts. Upon the entry of those findings the order will be entered of record.

Mr. Green: Do I understand that an order is now here, that your Honor has made an order striking his name from the Federal bar, that that is present now? Is that an existing condition now?

The Court (Fee, J.): That will go into effect when the findings and an order are entered on the journal of the Court.

Mr. Green: In other words, I am asking the question, then, [138] there is no change of status, in respect to this Court, of J. Robert Patterson at this time, and will not be until there are findings of fact and the order has been entered formally, is that correct?

The Court (Fee, J.): That is correct.

Mr. Green: Well, I assume that those findings and order, a copy will be submitted to me?

The Court (Fee, J.): Yes. Yes, they will be submitted to you before they are entered.

Mr. Dezendorf: There is one matter of reciprocity which the Committee is in doubt about and on which we would like your advice. In the past, when members of the Oregon bar have been disbarred by the Oregon State Bar in its regular procedures, the Oregon State Bar has referred to your Committee the record in those proceedings, along with a full record of the action taken by the Oregon State Bar. On one or two occasions in the past the question has arisen in our mind as to whether we wished, or the Court wished, in proceedings which originated solely in this Court—whether you wished to make the record in those proceedings available to the Oregon State Bar, and this case is the one which brings it most clearly in view, because it is a proceeding which initiates here, without any earlier proceedings in the Oregon State Bar records at all.

The Court (Fee, J.): It is the opinion of the Court that we will initiate no steps looking toward that development, but [139] if the Oregon State

Bar initiates proceedings, then we will take the question under consideration.

Mr. Dezendorf: Thank you.

The Court (Fee, J.): Court is in adjournment.

(Whereupon, at 4:15 o'clock p.m., June 28, 1948, proceedings herein on said date were concluded, the Court taking an adjournment.)

Friday, July 30, 1948, at the hour of 11:25 o'clock a.m., further proceedings herein were had before the above-entitled Court, as follows:

Additional Appearances: Honorable Henry L. Hess, United States Attorney.

The Court (Fee, J.): Now, Mr. Green, I understood that you had asked for a hearing at one time upon the findings, and after I looked over the findings myself I was not quite satisfied with them for certain reasons which I will divulge a little later, so after you withdrew your request for findings I told Mr. Mundorff that we would go ahead with the matter and bring you in for whatever you had to say, and then I have some comments of my own.

Mr. Green: May I proceed now?

The Court (Fee, J.): Yes, please.

Mr. Green: Well, your Honors, we have filed a motion to amend the proposed findings of fact, and if these have been studied by the Court, together with the record,—And I assume that they have been—I will make my remarks very short, and if you have the proposed findings as submitted by the Committee, on Page 2, beginning in Line 10, the proposed findings of the Committee read as

follows: "All of the matters herein concerned occurred while Mr. Patterson held the office of Assistant U. S. Attorney and while he was engaged in private practice in [141] association with Milton R. Klepper and McDannell Brown."

I think the record bears out our objection, and what we have asked in our motion is that that be changed to read:

"All of the matters contained in Paragraphs III, IV and VI occurred while Mr. Patterson held the office of Assistant U. S. Attorney and while he was engaged in private practice in association with Milton R. Klepper and McDannell Brown and after the filing of assumed name certificate in Multnomah County and doing business under a firm name." Now, a reason for that,—And I stop at that point—that these matters that are set forth in Paragraphs III, IV and VI did occur after the assumed name certificate was filed, but it would be inferred, I think, by anybody reading the findings proposed by the Committee that all of the things occurred after the assumed name certificate had been filed.

Then we ask that this other sentence be added, and purely from the standpoint of getting at the ultimate facts: "The matters contained in Paragraphs II and V occurred while Mr. Patterson held the office of Assistant United States Attorney and while he was engaged in private practice in association with Milton R. Klepper, but before any assumed name certificate had been filed in Multnomah County and before the findings had been

submitted in the firm name." I think that was before any of the matters in the testimony.

The Court (Fee, J.): How about it, Mr. Dezen-dorf? Is that [142] in accordance with your understanding of the record?

Mr. Dezen-dorf: With respect to Paragraph V, the dates are given specifically; and in Paragraph VI the date is given specifically; so that I really don't see that we are in any disagreement on it and I think the findings as now drawn show that. I would have to check the record again in the Hughes case to verify the date, though I am pretty well convinced from my recollection that the Hughes case and everything that happened in it was prior to the date mentioned in Paragraph VI, which was October 2nd, 1946. So that it is very possible that there is nothing between counsel.

The Court (Fee, J.): The Court will make the amendment if the record checks out in accordance with your suggestion, Mr. Green, and personally I think it does.

Mr. Green: Now, our second paragraph of my motion to amend the proposed findings of fact,—and this is solely for the purpose of having these findings conform to the record—and that is by striking the word "employed" appearing in Line 17 on Page 2, and inserting the words in place thereof "as a passenger." In other words, the findings say, "That J. Robert Patterson represented Marvin L. Hughes who was injured while employed on a vessel operated by the Alaska Steamship Company." Now, Marvin L. Hughes was a passenger on the steamship and not an employee.

Mr. Dezendorf: That is correct, according to the record.

The Court (Fee, J.): The amendment may be made. [143]

Mr. Dezendorf: And the file shows that every thing in the Hughes case did happen before October 2nd, '46, so that the proposed change would not be out of order.

Mr. Green: Now, our third—well, subdivision of Paragraph II, asks to strike the following phrase which appears beginning on Line 19 of Paragraph II of the findings of fact, where these words are quoted in the proposed findings of fact, in Line 19—That is, between Line 19 and Line 20—It says, “before the suit was commenced Mr. Patterson knew,” and we ask that there be inserted the following words, “it became apparent to Mr. Patterson after the defendant’s answer was filed.”

Now, the record on that, your Honor, in the transcript, on Page 95 of the transcript,—and this is under cross-examination by Mr. Dezendorf—this question was propounded to Mr. Patterson:

“Q. As I understand it, it became apparent very early in the case that the defense was going to contend that the United States was the proper party defendant?

“A. Yes, in their answer they raised that question.”

Now, I think their reason, perhaps, for asking that is that that be amended to conform to the record. I think that that was the time that Mr. Patterson knew that the United States was going to be made a proper party defendant, and I think that is

a fair interpretation to be placed upon this testimony here and, so far as I have been able to determine, that is the only [144] testimony that touches upon that particular feature of the case.

The Court (Fee, J.): Well, of course, there is a little more involved than that, Mr. Green. That is, the Court could conclude, as I think the Court will have to conclude, in some of these instances Mr. Patterson knew of certain things before they were specifically called to his attention by someone else. In other words, I think the Court could make such a finding. I would amend it by saying that "Mr. Patterson admits that he knew when the answer was filed."

Mr. Green: Yes. Now, the reason that I have made that amendment, your Honor, is because right at that time this law with respect to the agreements, and so forth and so on, was and still is in a condition of flux, and so, therefore, I think that lawyers might have thought that such-and-such a defense; but when we come now to the statement that Mr. Patterson knew what the defense would be—because we have all had experiences in a situation of that kind, until we just didn't know,—

The Court (Fee, J.): Well, I have no objection, if you want to accept my change, to saying that "Mr. Patterson admits that on a certain day he knew of the filing of the answer"—If you will accept that, I will amend the finding.

Mr. Green: I think that is a fair statement of what the record shows.

The Court (Fee, J.): All right, we will amend the findings in that particular. [145]

Mr. Green: Now, our third paragraph, we ask that there be stricken the following words from Paragraph III of the findings of fact, beginning on Line 7, Paragraph III:—Now, Line 7 in Paragraph III is the proposed finding of the Committee, and that portion to which we refer reads as follows: “that at the time he accepted employment”—just concerning ourselves with those words—Now, we think that it is a fair statement of what the actual facts were and what the record shows that there should be inserted, “that subsequent to the time he accepted employment and before the trial.”

Now, this comes out as a part—And I base this as part of the record appearing on Page 93, where your Honor was asking Mr. Patterson some questions, and you asked Mr. Patterson, you said, “Mr. Patterson, your present answer omits a portion, ‘although he expected to be called as a witness at the trial.’ I take it that you mean by your statement of it now that at the time you took the employment that you did not expect to be called as a witness, but——” Then the answer, “I did not even consider that, your Honor.

Then,

“The Court (Fee, J.): But subsequently, and before the trial,——” And Mr. Patterson says, “That is true.”

“The Court (Fee, J.): ——you did expect to be called, because Mr. Hicks said so?

“A. There was a possibility, yes.”

That was made in response to your Honor’s ques-

tion, and [146] what we have asked here is that the findings of fact be amended to comply with what I think the record substantiates.

The Court (Fee, J.): What do you think about that, Mr. Dezendorf?

Mr. Dezendorf: I think a consideration of Mr. Patterson's whole testimony on that point indicates very clearly that the reason he accepted employment was because he had represented the parties in a divorce suit and he anticipated at the very outset that he would perhaps be, or should perhaps be, a witness in the case; and while it is true that the portion of the record which Mr. Green read establishes his point, to me there is no other way of explaining why Mr. Patterson got into it in the first place than his expectation that because of his previous knowledge he would have to be a witness, and that is very obvious, that he would have to go into the case because of his prior representation of the parties.

Mr. Green: I think that is a very unfair statement. I think the record shows that he had represented Mr. Bowden previously, but with respect to the fact that he anticipated—And I am unable to find anything in the record that he expected anything when he accepted the employment—to say that Mr. Patterson is going to anticipate that he is going to be called as a witness because he represented people in a divorce proceeding is something beyond the ken of this record entirely.

May I read one other part of the record, your Honor, [147] on this same point?

The Court: Yes.

Mr. Green: This is still on Page 93. This is in response to a question by myself on direct examination:

“Q. Now, when this Bowden trial started, or before the Bowden trial, what was in your mind in respect to your expectation of being called as a witness?

“A. Well, it never entered my mind, but later, after Mr. Hicks and I had talked about it and after he had started to prepare the defense, he said that ‘It may be that the State will bring in all this stuff about the divorce case, and in that case you will probably have to be a witness.’ ”

Now, I say, I make this statement, that he anticipated this before trial, but not before he accepted employment, in conformance with the facts.

The Court (Fee, J.): Mr. Green, I think on that point that I will accept, if you agree, the same formula that I suggested before, that “Mr. Patterson admitted,” not saying anything about the prior question,—that he “admitted that just at the time of the preparation of the defense he knew that there was a possibility of his being a witness.”

Mr. Green: I think that is what he did admit while he was on the witness stand, your Honor, so I think that conforms to the facts. [148]

The Court: Yes, that conforms to the record and contains no indication that he knew of it at the beginning, at the time of trial. As a matter of fact, that is not the point of the charge here. That he knew he was going to be a witness when he was Assistant United States Attorney,—That is the point of this charge.

Mr. Green: Then do I take it that that finding will be amended as we request, "that subsequent to the time of taking employment and before trial," so as to make this read, "subsequent to the time of taking this employment and before trial that Mr. Patterson anticipated that he might be called at the time of trial?"

The Court (Fee, J.): Yes, if you place that in the form of an admission, Mr. Patterson admits that.

Mr. Green: Then if this is made to read as follows, beginning with the word "that" in Line 7 of proposed finding numbered III, "that subsequent to the time he accepted employment and before the trial Mr. Patterson admits that he anticipated that he might have to be a witness at the trial?"

The Court (Fee, J.): Have you any suggestions further on that, Mr. Dezendorf?

Mr. Dezendorf: No, I haven't.

Mr. Green: Now, with respect to our motion, Paragraph IV, striking from Paragraph V of the findings of fact, beginning on Line 6 of Page 4, "he considered himself as a special or limited [149] partner of Milton R. Klepper, although, in fact,"—And add the word "existed" on Line 8, and we want that portion stricken and add the following words—Well, I don't even find my own words now, your Honors. Oh, yes,—Those words, we ask that they be stricken because it does not conform with the record, there is no testimony, and then that after the word "existed" in Line 8 there be inserted "between Milton R. Klepper and J. Robert Patterson." In other words, that would make the

sentence complete. My whole objective in getting this whole situation here is simply to make the record, as we state, conform entirely with the facts.

Mr. Dezendorf: I think both the testimony of Mr. Patterson and of Mr. Klepper fully support the statements made there.

Mr. Green: Mr. Patterson did answer at that time, I think, specifically, in the record at Page 104,—This is after Mr. Brown came into the situation——

“Q. Well, did you ever consider yourself a special or limited partner with Mr. Klepper and Mr. Brown?—This is Page 104——

“A. Well, you mean in my own mind?

“Q. Yes.

“A. Well, I considered myself this way, Mr. Dezendorf, I might answer your question this way, that if we didn't take any income in down there I wouldn't get any money. I mean I devoted myself to his work and he devoted himself to my work, and if there was any lack of income I was [150] certainly trying to—it was certainly going to result in my disfavor, in that I wouldn't have that money to——,” Then he interrupted,

“Q. You mentioned a firm name, did you not?

“A. Yes.”

The Court (Fee, J.): That runs over onto the next page:

“Q. Well, did you ever consider yourself a special or limited partner with Mr. Klepper and Mr. Brown?

“A. Well, you mean in my own mind?

“Q. Yes.

“A. Well, I considered myself this way,”——

Mr. Green: That is on Page 105 you are reading from?

The Court (Fee, J.): Yes.

Mr. Green: Yes, I just read that. The point that we make of this, your Honor, is that this allegation in Paragraph V, United States vs. Costello, occurred right before Mr. Brown went into the office and before the assumed name certificate was filed and before this situation arose, and this finding here would infer that all this happened subsequent to the time that Mr. Brown was at the office and subsequent to the time they filed the assumed name certificate, and so forth.

The Court (Fee, J.): We will take that under advisement. My present idea is that Mr. Patterson did consider that he was a partner at all times. I will take that from the record, but I will take it under advisement. I can't presently place my hand [151] on something that I thought was in the record. I may be mistaken. I will take it under consideration.

Mr. Green: That is all, your Honor. That concludes my motion. Well, I have omitted one thing, your Honor, and I simply want to make it for the record, so that there will be no question that we have waived our objections. We made the general objection to the Conclusions of Law numbered I and III appearing on Page 5 of the Findings of Fact and Conclusions of Law "in their entirety, on the ground and for the reason that the said Findings of Fact do not substantiate or warrant or justify the conclusion of law that J. Robert Patterson was guilty of any unprofessional conduct or that he has shown such

flagrant disregard of the rules governing professional conduct that he should be disbarred permanently or at all or that his name should be stricken from the roll of attorneys entitled to practice in this court.”

Now, that matter has been considered before and I simply mention that so that we won't be considered as having waived any of our rights.

The Court (Fee, J.): No question about losing any rights, Mr. Green. This is not a technical proceeding. The only reason why I wished to have you come into court was on account of the fact that I wanted to be sure that we had fully understood your position. I have read your briefs, but I have never heard you argue this question orally, I am not sure that you want to argue it orally, but I have also heard suggestions that you were going to take an appeal and I wanted to be sure that we knew before we went ahead just what errors you think we have made in making these findings.

Now, I do not address myself to Mr. Patterson, because, after reading this record, I think that Mr. Patterson is afflicted with a moral myopia as far as his obligations to the bar and the Court are concerned, I think that he has no respect for the Court, I don't think he has any respect for the Judge, and I think this record shows it clearly,—

Mr. Green: I didn't hear that.

The Court (Fee, J.): I say, and I think this record shows it clearly; but I have known you for a long time, Mr. Green, you have an excellent reputation at the bar of this state, and I

think the bar ought to wash its linen in private in as far as it can, so I really want to know of you—I am not trying to stop you from taking an appeal or protecting your client's rights in any way that you want to, but I do want you to say as clearly as you may why you think this Court is not entitled to protect itself against the things that were done here by Mr. Patterson. I think if Mr. Patterson proceeds on the course that he has gone, with entire disregard to the ethical obligations of the profession, he is not only going to get himself into trouble, he is going to get a lot of other people into trouble, and that is why I think this Court is bound to accept the recommendations of the Committee, in order to protect itself. [153]

Now, there are some things that I think are not stressed in the findings, and I think that those should be incorporated in there. So far as I am concerned, I will not release this record until they are written in there.

For instance, I think that the gravamen of the charge in this case was that Mr. Patterson was a responsible official of the United States and of this Court, and that this Court would be entitled absolutely to rely upon the fact that he dealt with the judges, the attaches of the Court, and all persons who were in a position where they had to rely upon the Court for protection, with entire candor. I think that is where Mr. Patterson has made the mistakes which I think have brought him to the present pass. For instance, in the finding regarding Martin, I think

a salient factor—Now, this was discussed in the transcript—that one of the salient factors of that situation has been left out of the findings, namely, that Martin was an attache of the Court, in a way, one of the Court personnel, entitled to rely upon the Court for protection. He was a parolee. Now, even the charge does not contain the word “parolee.” I don’t think there was any question in anyone’s mind that that is what Mr. Patterson was contending, I think that is what marked a special class, but not only Martin himself, but the Judges of this Court, the probation officer that brought him to Patterson and the Court, were entitled to rely upon Mr. Patterson for something entirely different from what he did because he was a parolee. Now, if these people who are dependent upon this Court for protection are preyed upon by the responsible officials who are attached to the Court, then I think that this Court is in a situation where it could not operate with the confidence of the public.

Now, I think that that is the important feature of the charge and it is not expressed in the findings. Now, it must be expressed in the findings before we let the matter go.

Now, in the Costello case, looking at this from the situation of the Court, you know that I have the greatest respect in the world for this Court,—In fact, it has always had a reputation for honor and integrity on the part of its judges and on the part of the Court itself. Now, it is inconceivable to me that there is any defense to the conduct of a responsible officer of the Court who

brings in here a man who has been previously convicted in this Court, brings him before the bar of the Court and recommends him to some person, some other lawyer, to whom he stands in special relation,—I don't care whether that is partnership or what it is, it makes no difference in my mind—and then brings him up in court and, without telling the judge that is on the bench of this situation, has the judge accept the plea of Mr. Klepper, with whom Mr. Patterson stands in special relationship, and there is a fee paid by Costello or someone who is interested in him, because again the thing that I think must be written in some respect in the findings is What did [155] Costello think the money was being paid for, and I say to you that if Costello had been sentenced—And probably if he had come before he would have been sentenced to the penitentiary, because I had dealt with him before—If he had been sentenced under those circumstances he could have filed a writ of habeas corpus, asked for a writ of habeas corpus, and I think the Supreme Court of the United States, according to their tenor, would have granted it on the ground that he had been misled into entering a plea of guilty by a responsible official of the United States and officer of the Court, and I have no doubt that if that had been the situation Costello would have said that he thought some money went to the judge. As a matter of fact, in some proceeding, not of this record, I understand he did make some such statement, that he thought that the judge had been paid.

Now, that is the danger that I see in this situation and the reason that I believe that these findings have to be strengthened upon the line of stating some of the implications. I am not so sure if Mr. Patterson had not been appointed as an officer of the United States that we would have had to take so much interest in this situation, but here the judges are almost dependent upon the recommendations made by Assistant United States Attorneys. And I may say, having tried the Johnson case in Pennsylvania, that there the situation came about not by responsible officials but by sons of the defendant judge, and, while the jury exercised their prerogatives and did acquit Judge [156] Johnson, I may say that the record in that case did not show that any money went to Judge Johnson——

Mr. Green: I didn't hear.

The Court (Fee, J.): I say that the record in that case did not show that any money went to Judge Johnson, but there was a situation that is almost parallel with this, of maneuvers by the sons of Judge Johnson and the courts and people that were dealing with them, that the Judge had not been innocent. But the situation, to me, the build-up, was a situation that is entirely similar to this one that is before the Court.

Now, as I say, if you have anything in mind which would militate against that, or any other suggestion as to why these findings or this conclusion are in error, Mr. Green, I shall give you a very careful hearing on the subject, because I think that this Court is bound in each one of

these instances to enter a flat finding to the effect that Mr. Patterson acted willfully in disregard of the obligations that lay upon him as an official of the United States, and I must say that at the time we enter findings I would feel bound to write an opinion in which I set out something of the viewpoint that I have here expressed. As I say, I am going to give you full opportunity to rebut that if you wish, any argument on the subject that you wish, but I feel that it should be said, and say, that, as far as the Court is concerned, as far as I am concerned at least, the findings must be strengthened, before they are entered,—

Mr. Green: I didn't hear the last, your Honor.

The Court (Fee, J.): The findings must be strengthened, before they are entered, along the lines that I have suggested.

Mr. Green: Do you want to hear me now, your Honor?

The Court (Fee, J.): I have some people waiting for me, and if you will pardon me a moment, Mr. Green, I will go out, and then I will hear you.

Mr. Green: That is all right. It is only going to be a very short statement.

The Court (Fee, J.): All right, if you will excuse me.

(Judge Fee then left the bench and returned shortly thereafter, following which proceedings were had as follows:)

Mr. Green: Now, may it please the Court, I did not anticipate, when I came up here this morning, that there was going to be anything

before the Court other than our motion to amend the proposed findings of fact.

The Court (Fee, J.): I will give you time, if that is what you wish.

Mr. Green: I am quite anxious to have this matter concluded at an early date. We tried this matter on December 19th, and it leaves Mr. Patterson in a condition where he can't do anything. The findings were returned on June 28th, and it is now July 30th, and your Honor has indicated, at the time we had the appearance here before you in June, what your findings were going to be in [158] the ultimate analysis, so therefore I think so far as we are concerned, we can expedite the matter by having the matter before the appellate court, and this is the only thing I have to say with respect to what your Honor has said, and it requires me to relate some of the experiences I have had, because I was on the Grievance Committee of the Oregon State Bar Association for a number of years and was on the Trial Committee for a number of years and have gone through a number of these proceedings, and have prosecuted and have defended people charged with unethical conduct touching upon their qualifications to remain as members of the bar, and since I went over the situation at first—And I say this with all sincerity to your Honors—I haven't changed my mind from the first instance in this case that Bob Patterson was not doing a thing in which he was consciously aware that he was guilty of unethical conduct.

Now, let's take the Hughes case, which was the

passenger case. Now, he is charged with unethical conduct here because he knew that that would be a part of the defense, but if anybody can tell me what that law means at the present time, if any lawyer can tell me what that law means at the present time, I would like to know it, because I have searched, and we have a case on appeal to the United States Supreme Court now to finally determine that very question, and as I said to your Honor before, that if in the Caldarola case the majority of the Court had taken the position that the four members of the Court took that the *pro hac vice* [159] doctrine controls the contention made by Bob Patterson would be correct, except in one particular, and when we come down to a case where four members of the Supreme Court of the United States say one thing and five say another and they make a finding of guilty of unethical conduct on that ground, it seems to me it is stretching it quite far.

Hughes was a passenger and not an employee, and we say that during the war emergency a passenger had no right of action against anybody, because he waived his right, and the rules promulgated by the War Shipping Administration say that in as far as the state is concerned, so that you might know that we were going to urge that the United States of America would be a party defendant, and we relate these things sometimes to personal matters. I have had as many as 50 situations in the office in which passengers and employees were concerned, where the Government did not come in and make that contention, but

they came in and settled the cases, and we never know, from time to time, whether they are going to depend on the general agency agreement or on the basis of what Judge Frankfurth^{er} said in the Caldarola case. Just this week I read a case in the American Maritime Report where it says that the Government took over and made all investigations with respect to the defense and at the last moment, and before trial, they came in before a court in the East and tried to employ some other test so that they could be indemnified if they were held responsible. In other words, [160] even at this time, in 1948, there isn't anything so unsettled as a situation growing out of the General Agency Agreement of April 4, 1942. Just simply the General Agency Agreement has never been settled, and I don't know that it ever will be settled, and all the rules and regulations were made, and that is what he is charged with with respect to Hughes. So I never have been able to see it. I have tried to look at it from the particular standpoint, and I have never seen where there was any violation in what Bob Patterson did in that case, and I think from the very fact that he was asking for a judgment against the Alaska Steamship Company he was contesting the very statement that was made that the United States was responsible.

The record of the Court was that there was, however, negligence, and I think if a proper defense had been made in that case Judge McCulloch would have held that there was no liability to Hughes when he accepted transportation on

that basis. Now, you say, "How can he waive a tort?" During the war emergency there were many things that you can say,—“I accept transportation on this freight vessel at my own risk”—so I have never been able to see where there was any complaint that could be made against Bob Patterson for prosecuting the Hughes case.

With respect to Westley Bowden, all that I can say is that the Attorney-General's Manual says that he should not. The first charge made against Bob Patterson says that the Manual [161] says "shall not," and they now correct the finding and say "should not." Now, whether or not there was a conscious intent here, it seems to me—And I say this with all due respect to your Honor, but you have expressed your opinion with respect to the whole situation, you have called upon me to make a statement and possibly to express my opinion—I think that your Honor has brought into this many of the things that are not in the record,—many of the things that are not in the record. Now, with respect to the Bowden case, there wasn't any secrecy about it. It was discussed before and discussed afterwards and everybody knew about it. There isn't a single situation here where there was any element of secrecy about anything and where anybody was getting away with anything at all from the standpoint of gain or from the standpoint of professional gain in any particular situation, and the facts are admitted in practically every one of these situations. We do not come before this Court and say that Bob Patterson did not do this or did

not do that. We came before the Court and, I think, made as frank a presentation as we possibly could. I am not conscious of having held back a single situation in this case. Now, he might be subject to criticism, since he represented Bowden as his attorney in the divorce proceeding and then appeared over in the State court to defend him, and that was discussed with the District Attorney of this County and no advantage was taken of the fact that Patterson—It was never mentioned that he was an Assistant United States Attorney, so far as that trial was [162] concerned. The whole trial was conducted by Mr. Hicks, and Mr. Patterson did accept a part of the fees because he did do a part of the preparation and did sit during the trial of the case.

The records are full of situations where Assistant United States Attorneys and United States Attorneys have done that, and my recollection goes back, enough back, to know that there was one United States Attorney in this District who spent most of his time in his private office conducting his private business, and this Manual is not an express prohibition. In other words, there is a leeway there that is left, and I don't think that there is involved with respect to this question that he anticipated before the trial that he might be called as a witness. That might be a question where a man should take a reprimand, but not a disbarment.

The Court (Fee, J.): Well, I may say, as far as that question is concerned, when you left that out of the findings I left that out of considera-

tion. The fact that he might have anticipated that he was going to be called as a witness I think in this situation is entirely immaterial. I think the charge is that as Assistant United States Attorney he defended a first-degree murder case, or helped defend it.

Mr. Green: Well, if Bob Patterson is to be disbarred for that, all that I can say with respect to it, I am very frank to say that I am not familiar with all the practice, because I have never held a public office of any kind, until I got into the Manual, and there are many cases throughout the United States where United States Attorneys have engaged in private practice. Now, if you are going to permit that, it certainly in my mind is an entirely different situation.

Now your Martin matter: The charge is laid in here, your Honor,—I may be mistaken about this, because I haven't read the charge, but I know that Judge McColloch brought it up at the time of the trial of a parolee—but it isn't charged that this man took advantage of a parolee. We were never charged with that. This is the first time we have been met with that contention, and when I asked if that charge was going to be made—because it was something that was not in the original charge, and we would like to know and would like to have time to file a proper answer for it, because it was something new that had come into the situation, as I recall the record,—and I am only talking from memory now,—your Honor said, “We will proceed upon the charge as laid”—I think that was the statement, Judge Fee,

with respect to that Martin matter. And the Committee says—No, what we interpreted that to be, and the charge that was made was that he refused to represent this man. Now, it developed, what the facts were, that the United States Attorney's office had represented these people for a long time. It developed that that was wrong, that the United States was an adversary party in the situation, and it might be that he did wrong in saying, [164] "Well, what would the charge be?"—"Well, maybe a hundred and seventy-five dollars." I don't know whether it is wrong or whether it isn't wrong, because I am not too familiar with what the United States Attorney's office does with respect to their private practice.

Now, I make it very clear that so far as the parolee element is concerned we were never charged with attempting to take advantage of the parolee, unless upon the ultimate analysis of the thing. We never saw the man after that and we never did anything except to say, "If you don't get satisfaction and want to come back, come back and talk to us"—indiscreet, possibly, but certainly not that element that your Honor indicated here of a lack of morality that would refuse to permit a person to practice law.

Now, the Costello case: I have read the record in that, and that was tried before Judge McColloch, and it has been many years since I have defended a criminal case,—I don't know that I have since Judge Wolverton tried one on the Mann Act—I tried a case before Judge Wolverton back in the 1920s. Let me say this: Your Honor has

brought up the question that possibly Costello inferred—Or I think you made the statement that Costello had said that maybe the Judge had been approached in some manner. I got that inference from what your Honor just read in the record. Now, I submit, Judge Fee, that you can't premise a disbarment, and you shouldn't premise a disbarment, upon what somebody is going to say to some lawyer, and if you do that you are going to disbar 99 per cent of the lawyers in the State of Oregon. By that I simply mean this, that we are in a profession where it is very difficult to satisfy a hundred per cent of our clients at all times, and I don't care whether you charge them with crimes, possibly a civil matter. And I get cases in my office, statements which I, of course, know to be entirely untrue, and Jim Dezendorf undoubtedly gets reports, although when you are in corporate practice you probably don't get so many,—but **Jim Dezendorf** gets reports where they probably criticize him very severely, and so on, and, so far as I am concerned,—I know you made much of that—to me it just doesn't appeal; but if you are going to disbar anybody on that account, and disbar them forever, then you are going to have to say you take up the gossip of these people that are not satisfied with what you have done. Every time, with such a lawsuit in our office—not every time, but many times, I have heard fellows call up and say this person in my office—they criticize them most bitterly, and I call the lawyer in, and I know they have been properly represented, and try to appease them, and you

have to recognize the situation. But you can't follow a situation of that kind to its ultimate limits and say you are going to disbar a person on that account, and I don't care what Costello said, because I can take you to any number of criminals and they will tell you all kinds of cock-and-bull stories with respect to this, that and the other thing. But in [166] the Costello case the record shows that Judge McColloch asked Mr. Patterson, "Do you have any recommendation?" And he said no, and it was Mr. Klepper's statement,—It is all in the record, complete,—And it was based upon that that the man was given probation, not upon any recommendation that Bob Patterson gave.

Now, although Bob Patterson stated—And I think I indicated this in the record; I am not sure about this point—he might possibly have been subject to criticism when Costello's relatives or somebody asked him for the names of some lawyers, he gave them three or four names and among those was Mr. Klepper—Now, I think that Patterson should be criticized for it, but it isn't that type of conduct—although you can find myriads of cases in the books just like it—it isn't that type of conduct that shows that condition and mental situation that your Honor just talked about whereby a man should be disbarred, and I think when we come to the point, your Honor, of saying that by virtue of the fact that Costello—And I get it, from what has been said here, that he was at least a two-time loser, and maybe more, I don't know,—but you said you had him

before you, and I know he was before Judge McCulloch—When we get to the point where Costello or Joe Doakes gets up and says, “Well, Judge Fee was approached by my attorney and I therefore got a light break”—If you are going to disbar him you are not protecting the bar by doing that, you are condemning the bar and [167] putting them in a bad position, because these things are going to accrue and accrue and accrue, and you can’t depend upon matters of that kind for disbarment, and I think, if you take the record in the Costello case, that one thing that Patterson should have been criticized for, he put in the name of Klepper—If he had given the name of Green, or Ben Anderson, or four or five other fellows, I don’t think he would have been subject to any criticism, to go to any one of these lawyers, but he is subject to criticism because he gave the name of the man he was associated with. So I say criticism, but not disbarment.

Now, your last charge, that they filed the assumed name certificate under the name of Klepper, Brown & Patterson, is another situation, and all I can say, it is misjudgment on his part, probably didn’t give it a second thought. I don’t know who prepared the assumed name certificate. I think the record shows that Mr. Klepper prepared it. Very few lawyers do file assumed name certificates. I know that we never have in our partnership. Maybe we should, maybe we should be subject to disciplinary action for that reason, but the only thing that I say about it, there is no showing in this case that anybody was ever

injured, no showing of any misrepresentations. There is a showing that Patterson, so far as he could, did work for Klepper there in the office with him and took care of part of his business, which was the arrangement, and that what they anticipated was a partnership, which was finally consummated. [168]

Now, the canons, or the ethics, some of the rulings which were submitted to your Honor, and your Honor said you would take them in the matter of argument, some of those rulings that were submitted I am frank to tell you that I don't know where I would find them; I never have heard of them. Maybe I am pretty callous, maybe I have been at it for thirty-four years and just haven't learned anything, but I have watched a great many people come and go, and I have watched people who say that they are very, very ethical concerning matters, but I happen to know some things about them that convince me to the contrary, but I have never considered them a subject for disbarment, if you have to go to a canon or a ruling of the American Bar Association, that I challenge anybody it will take a long time to find, to determine that, and it has never been ruled upon in this state, in as far as I know, and to say that a man is going to be denied his livelihood the rest of his life on that account,—maybe a reprimand, maybe it should be something more serious than a reprimand, but certainly there should not be taken away the livelihood, because the test is what is in the person's mind and not what we can assume was in their minds that would

place them on the side of guilt, but what was in the person's mind that was an injury or a misrepresentation to anybody, and there isn't a scintilla in this record that there was any misrepresentation that was any injury to anybody.

So I say in all sincerity I think the statement that [169] your Honor made is not from the record and is not borne out by the record. I think the most that should be at this time dealt out to Bob Patterson would be disciplinary action of a minor nature, because we have said, and I think we have demonstrated through this whole proceeding, that there was not any objective on his part to color or to dodge or to switch around the corner in any particular. We simply came out and admitted practically everything that we have been charged with. I don't know of anything excepting—Well, I don't know of any particular thing of any great moment where there is any great disagreement in facts on this situation, and I urge upon the Court with all the power that I have that this man be subject to disciplinary action, he should be subject to a reprimand, he should be subject to possibly a minor disciplinary action, but not a disbarment, and I have been unable to find in the books—And we have searched carefully, I have searched and Mr. Patterson searched, and I had a search made by another person—and we have been unable to find any similar situation where the Courts in the final analysis have said in a situation of this kind it should be submitted to disbarment.

I want to make this statement to the Court,

because Mr. Mundorff, the Clerk of this Court, has indicated to me that this thing should be given to publicity after your Honors have signed the order,—And this comes to your Honors as a request, because I know I stand before you in that position—and that [170] is to state if you are going to disbar him it isn't the end of the trail, and I think this should be something to the effect that it is a finding of the Grievance Committee or the State Bar and that it is not the final finding in the situation, that there isn't any publicity about it. Of course, when it goes up to the Supreme Court then there will be publicity about it. I would request that the matter be not given out until the matter of appeal has been determined, although that can only come from me as a request.

And the other thing that I would urge upon your Honors is simply this, that whatever determination is made we would like to have it made at the earliest possible date, because it leaves Mr. Patterson in the position, has left him in the position since December 19th, 1947, where it is impossible for him to make any particular plans or do anything with respect to associating with anybody else. In other words, he is on the griddle every day. He has had many opportunities to associate with other people, or other people have wanted to come into his office, but he can't say "I will associate with you" or "I will go into your office," simply because he doesn't know what is going to happen in this situation.

Now, I think you have a perfect right to deter-

mine it, I am not questioning that, but I think you should, in all fairness to Mr. Patterson, determine it at an early date, because from December 19th it means that there has been substantially [171] more than eight months since we had this hearing, and during this time Mr. Patterson has been on the griddle, and I sincerely request, with all the earnestness I can command, that you do give Mr. Patterson a speedy determination on this and that the matter remain private until our appeal is in the Circuit Court of this Ninth Circuit.

The Court (Fee, J.): Well, the Judge appreciates the statement of your position. We really wanted sincerely to have that in the record, so that we could understand why it was that you did not believe these findings to be correct. But as to moving the case along, I agree with that, only with this suggestion, that it is admitted in this record that Mr. Patterson knew that this man was a parolee. Now, if you insist on trying that thing out I will have to set that down for retrial, because that is one of the facts that is in the record. I think it should be referred to in the findings. If you feel that that must be done and you must have more time, then I want to say that we would want to try that thing out, because I think it is a salient factor in Mr. Patterson's picture. It is in the record, I have read it, that he admitted that he was a parolee, he knew he was.

Mr. Green: I think that is true. I think Judge McCulloch made some statement, and he

pointed his finger at me and he said, "You had better be prepared to meet this, because this is a parolee," or something to that effect, and then I said, "If we are going to be faced with that, we should have the charge [172] laid," and then your Honor turned to Judge McColloch and had a few words with him and you said, "We will proceed with the charge as laid."

The Court (Fee, J.): That is right. I think that is correct. If you want some time to defend against that we will have to open it up and let you defend.

Mr. Green: Your Honor, I am more concerned with getting this matter determined. I am not going to ask for any more time. I am more concerned with getting this matter determined.

The Court (Fee, J.): All right, I tell you that I consider that one of the salient features in that particular incident and I am going to refer to it in my findings.

Mr. Green: I understand that.

The Court (Fee, J.): Now, as far as any suppression of publicity, I think that once this judgment is entered it must be of record in this Court before an appeal, I think that immediate publicity would follow. I don't think it could be suppressed. I don't see any way out of it.

Mr. Green: I made that request because I have known of situations in this Court where they have been reprimanded, and so forth, where there has not been any publicity upon that.

The Court (Fee, J.): Oh, yes, I think that is correct, but the situation of disbarring will go on the record of this Court, it has to be, as a judgment of this Court, and whenever it is entered here then I think that the cats are loose, I don't think [173] that anybody can do anything about it.

Mr. Green: Well, disciplinary action is a matter of record also and it is spread in the records of the Clerk's office. In other words, what I am saying is that I requested, and from the information I have received, that this same treatment be accorded to Mr. Patterson with respect to no publicity that has been accorded to other people that have been disbarred.

The Court (Fee, J.): So far as I know, there has never been a suppression of a judgment of disbarment.

Mr. Green: No, not of disbarment. I didn't say that. When I used the term "disciplinary action" I meant various and sundry types of action that are taken against persons for unethical conduct, whether it be disbarment, or reprimand or private reprimand or public reprimand. I meant to include all in my expression "disciplinary action."

The Court (Fee, J.): So far as I am concerned, since this Committee has been established, any action that has been taken has been, and will be, placed of record, with regard to anything.

If there is nothing more to be said, we will now recess.

Mr. Green: Just a moment. Do I understand, then, that there will be new findings served upon us?

The Court (Fee, J.): Yes.

Mr. Green: Some findings prepared by the Committee and served upon us?

The Court (Fee, J.): Yes, and I have no objection at that time to giving you a copy of the opinion that I intend to write.

Mr. Green: All right.

The Court (Fee, J.): And if you wish to have a hearing on that I will accord you that. I will give you a hearing on either the findings or the opinion.

Mr. Green: I do understand—The last time we were before the Court I asked your Honor this question—The status of Mr. Patterson before this Court is not changed until the order is made by the Court, is that correct?

The Court (Fee, J.): That is correct.

Mr. Green: That is correct?

The Court (Fee, J.): That is correct. I would say, in that regard, that I would disqualify myself if he appeared before me.

Mr. Green: Well, I understand that, but then our appeal time starts from the time that this action is——

The Court (Fee, J.): Yes, so far as appeal is concerned. I just want to make plain my personal

attitude. I will personally never hear another matter in which Mr. Patterson appears, because I am prejudiced against him, I am prejudiced on this record.

Court is in recess.

(Whereupon proceedings herein on this 30th day of July A. D. 1948, were concluded, and at 12:15 o'clock p. m. of said date the Court recessed.) [175]

REPORTER'S CERTIFICATE

I, Cloyd D. Rauch, a Court Reporter of the above-entitled Court, duly appointed and qualified, do hereby certify that on Friday, the 19th day of December, A.D. 1947, on Monday, the 28th day of June, A.D. 1948, and on Friday, the 30th day of July, A.D. 1948, I reported in shorthand certain proceedings had in the above-entitled matter before the Honorable James Alger Fee and the Honorable Claude McCulloch, Judges of the above-entitled Court, that I subsequently caused my said shorthand notes to be reduced to typewriting, and that the foregoing transcript, pages numbered 1 to 175, both inclusive, constitutes a full, true and accurate transcript of said proceedings, so taken by me in shorthand on said dates, as aforesaid, and of the whole thereof.

Dated this 10th day of August, A.D. 1948.

/s/ CLOYD D. RAUCH,

Court Reporter.

[Endorsed]: Filed Aug. 11, 1948. [176]

[Title of District Court and Cause.]

Portland, Oregon

Monday, Jan. 24, 1949, 1:30 o'clock p.m.

Before: Honorable Claude McColloch, Judge.

Appearances: Mr. James C. Dezendorf, representing the Standing Committee on Discipline to the Bar of the above-entitled Court. The Respondent, Mr. J. Robert Patterson, appearing in person and by his attorney, Mr. B. A. Green. Mr. Henry Hess, United States Attorney, and Mr. E. B. Twining, Assistant United States Attorney.

TRANSCRIPT OF PROCEEDINGS

The Court: I will hear you on your motion, Mr. Green.

Mr. Green: Your Honor, we filed our motion to amend the Findings of Fact as they were presented to us, and then we have filed objections to the Conclusions of Law.

I have very little to say with respect to the motion to amend the Findings of Fact. It pertains to this one sentence only, in Paragraph I, Findings of Fact, Page 2: "This Court was not aware of the relationship between Patterson and Klepper and between Patterson, Klepper and Brown until the same was brought to the attention of the Court by the complaint in this proceeding."

Then, again, in Paragraph II of the motion to amend the Findings of Fact, with reference to the following phrase appearing on Page 5 of the Find-

ings of Fact: "At the time of these occurrences the Court was unaware of the relationship between Patterson and Klepper and * * *"

I feel that these two statements indicate the Court was not aware of the relationship existing between Klepper, Brown and Patterson, although there were many pleadings before this Court where their names appeared on the papers, and the files that are here before this Court indicate that that relationship was apparent in all of these files. That is all I have to say with respect to that.

With respect to the general objections, or general objection—And it is a general objection which was overruled previously—since these are new Findings of Fact and new Conclusions of Law, we have objected to the Conclusions of Law Numbers 1, 2, 3, 4 and 5 and 6, appearing on Pages 5 and 6 of the Findings of Fact and Conclusions of Law, and object to them in their entirety, on the ground and for the reason that said Findings of Fact do not substantiate or warrant or justify said Conclusions of Law; and, also, that the record does not substantiate the Findings of Fact and Conclusions of Law.

That is the general statement we have made and the general objection that we have filed.

The Court: Mr. Green, the motion is denied and exception allowed. The objections are overruled and as to each and all exceptions are allowed.

I am signing the judgment of permanent disbarment based on the Findings of Fact and Conclusions of Law and the record, and the Clerk is

directed to enter the judgment and an exception is allowed.

Is there anything further? Enter the Findings, also.

Mr. Green: Is it my understanding, your Honor, these are being signed as of this date?

The Court: Mr. Green, I never get into any argument about the date of signing; I mean, the date that is put on the paper itself. Here is the judgment. I have just signed it. I am handing it to the Clerk now and he is directed to enter it. It is the first and only judgment that I have entered, and I don't know what date he will put on it. I imagine he will put today's date on it, though.

Mr. Green: Then, your Honor, may I ask this question? The Findings of Fact and Conclusions of Law, have they been signed?

The Court: The Clerk can answer that better than I can. He wants to know if the Findings of Fact and Conclusions of Law have been signed. Take them down there and show him.

Mr. Green: I don't know.

The Court: I don't know either. I think I know, but I do not know positively enough to answer your question.

Mr. Green: I see that they have been signed here. I am making inquiry, the same question. We will determine from the Clerk the date that is entered thereon. As I understand it, they had been filed prior to this time.

The Court: Before I went away, Mr. Green, in October, I signed some papers in this case. I was not sure enough, of my own recollection, to answer

some of the questions you have just been asking, prior to having seen the files. My recollection now is that I signed these Findings before I went away.

Mr. Green: Yes.

The Court: My recollection is that I also signed a brief opinion in the case before I went away. If these Findings and Conclusions have not yet been heretofore entered, I am now directing the Clerk to enter them as a basis for the judgment and decree which I have just now signed.

Mr. Green: Then, your Honor, is it proper for me to inquire: Will this be entered as of today? I inquire either of the Clerk or of your Honor. This will be entered as of this date, I assume.

The Court: Mr. Green, I never interfere with the actual dating of things by the Clerk. That is made his duty by the Rules, and I am directing that they be entered—Whether they have been heretofore entered I do not know. I don't know whether they have been heretofore entered. I have not examined the files closely enough.

Mr. Green: May I inquire, because that matter is of some importance from Mr. Patterson's standpoint—It is a secret record.

The Court: It won't be secret any longer.

Mr. Green: I understand, but it has been up to this date so, therefore, we have not been able to find out.

The Court: I think the record has been open to you, Mr. Green.

Mr. Green: Well, I appreciate that, your Honor, but the only thing I am trying to find out is whether or not they have heretofore been entered.

The Court: I don't know.

The Clerk: No.

The Court: Never have been entered heretofore.

The Clerk: I will now enter them and date them today.

Mr. Green: That is all I want to know.

REPORTER'S CERTIFICATE

I, Ira G. Holcomb, Official Reporter of the above-entitled Court, do hereby certify that I reported in shorthand the proceedings had in the above-entitled matter on January 24, 1949, and that the foregoing transcript, pages numbered 1 to 5, both inclusive, constitutes a full, true and accurate transcript of said proceedings so taken by me on said date, as aforesaid, and of the whole thereof.

Dated this 1st day of February, A.D. 1949.

/s/ IRA G. HOLCOMB,
Court Reporter.

[Endorsed]: Filed Feb. 1, 1949.

[Endorsed]: No. 12175. United States Court of Appeals for the Ninth Circuit. In re J. Robert Patterson; J. Robert Patterson, Appellant, vs. The Standing Committee on Discipline to the Bar of the United States District Court for the District of Oregon, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed February 7, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 12175

In Re J. Robert Patterson

STATEMENT OF POINTS ON APPEAL

The appellant respectfully submits the following statement of points on which the appellant intends to rely on appeal:

I.

The District Court erred in entering its Findings of Fact and Conclusions of Law and Judgment of Permanent Disbarment against the appellant, for the reason that the evidence is insufficient to justify or support the said Findings of Fact, Conclusions of Law and the Judgment.

/s/ B. A. GREEN,
Attorney for Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed Feb. 17, 1949.

In the District Court of the United States
for the District of Oregon

In Re J. ROBERT PATTERSON.

James Alger Fee, District Judge.

OPINION

The respondent, J. Robert Patterson, has been charged with several deviations from ethical standards as an attorney of this court and as an official of the United States, as Assistant United States Attorney.

The matter was referred by the court to the standing committee of discipline of the bar of this court, a group of lawyers of high standing in active practice who were designated and had functioned in other matters before the incidents hereinafter considered arose.¹ After an investigation, these brought charges against respondent, who then appeared personally and by attorney at several noticed hearings before the court, sitting behind closed doors, in order that no shade should fall upon respondent if the charges proved unfounded. Testimony was taken before the judges. The committee was then asked for a recommendation. The answer by the bar committee was a proposal for disbarment. The court accepted this recommendation, and ordered findings to be prepared. There was objection by Patterson to the findings originally submitted. Upon this suggestion, coupled with an intimation of appeal, the court asked counsel for Pat-

¹ David Lloyd Davies, Samuel H. Martin, Robert A. Leahy and James C. Dezendorf.

terson to state into the record all grounds upon which he believes there might be error. These matters were fully discussed at the hearing, where a member of the bar committee, respondent, his counsel and the judges were present. The reason for all this precaution is that the judges believe the bar should apply its own discipline. Likewise, since all previous proceedings had been secret, it was decided to fully canvass the situation before any record damaging to respondent be made public.

The bar of the federal court of the District of Oregon has always had extremely high ethical standards. The judges in the past have felt secure when one of the members of that bar made representation that action could be taken thereon without further investigation.

There are four excuses suggested for respondent. It is said that no one was harmed by what he did. It is also urged that Patterson did not violate any law or enforceable regulation, but only ethical standards. The contention is then made that respondent acted in ignorance of the fact that his conduct was unethical. Finally, he should not be stricken from the roll, but simply admonished because of the momentous consequences to a young men at the opening of a career. But the answers to these suggestions are plain. First, if moral unfitness to practice law be demonstrated, the court may protect itself from scandal and contempt, even though none of its suitors be injured, and even though the acts occurred in other courts or the delinquency was made patent in a private as dis-

tinguished from a professional capacity. Second, courts have not awaited conviction of crime before purging the roll of one shown afflicted by moral myopia. *Ex parte Wall*, 107 U. S. 265. Third, although the power should only be exercised in judicial calm, the court should strike one clearly shown to have acted so "as to be unworthy of the trust and confidence involved in his official oath,"² even though respondent was blind to the dereliction involved. Finally, the purpose of the proceedings is not punishment of respondent, but protection of the public litigants and wards of court and the efficiency of the judiciary as an instrumentality of justice. Sympathy for an erring member of our bar cannot weigh in the balance.

Therefore, the exercise of sound judicial discretion compels us to perform a distasteful duty in order to protect the integrity of the bar. The recommendation of the standing committee of lawyers, appointed long before these incidents had come to light, weighs heavily with us. Even if the bar had been adverse to disbarment, the record of respondent would compel drastic action.

The arguments of counsel for respondent set forth above overlook the cardinal fact that Patterson was not only an officer of the court, but an official of the United States. He, as such official, was not only unfaithful and disloyal to his client, the Government of the United States, but he was derelict in his duty to the court, not in respect to the judges personally, but through abuse of inter-

² Thornton, *Attorneys at law*, Vol. 2, p. 1187.

ests of those who, as wards, were committed to him as an officer of the court and of the United States.

There are four incidents which prove this indictment.

First, Patterson, while Assistant United States Attorney, defended a person charged in the state court with first degree murder. His official capacity was given wide publicity at the time of the trial. This conduct was contrary to the regulations laid down by the Attorney General of the United States, which were binding upon respondent as an official. The action was likewise against the ethical principles of lawyers. The public likewise were gravely offended that one whose chief duty it is to prosecute offenders appeared as a defender in a homicide case. Patterson says he did not know of the regulation, as though that were an answer. This incident is only an indication of betrayals of deeper consequence.

While Assistant United States Attorney, respondent brought an action for Hughes, a passenger on a ship operated by the Alaska Steamship Company, in the interests of the United States. Patterson made the steamship company sole defendant. But he knew that his client, the United States, would be morally and in certain events legally liable to pay any judgment which might be recovered. A great deal of argument has been wasted in proving the sound view at the time this suit was brought was that the United States was

not technically liable.³ Today it is admitted that the Government is making arrangements administratively to bear the burden of such recoveries. One of the reasons Patterson is not competent to practice law is that he is impervious to the suggestion that it was his sworn duty to refuse any case which might by remote possibility infringe on the interests of the United States. The interests of the Government cover the seven seas, and, if a Government official cannot be trusted to protect them, then he certainly cannot be expected to protect the interests of private suitors who seek his advice. A man cannot serve two masters. Since the duty of Patterson was primarily to the Government, he was incompetent to advise Hughes impartially whether to sue the Alaska Steamship Company or the United States or both. This persistent blindness to his obligations seems congenital.

The next charge is that Patterson, as Assistant United States Attorney, had turned over to him a parolee who was in charge of the Probation Officer, another official directly responsible to this court. The parolee had been a seaman. There had been money deposited in the registry of the court in San Francisco to which the seaman felt he was entitled. Patterson offered, as a private attorney, to attempt

³ At the time Patterson filed this action, the Supreme Court of Oregon had held in *Hust vs. Moore-McCormack Lines*, 176 Ore. 662, that the only remedy of a seaman under such circumstances was suit against the United States. Although this case was subsequently reversed by the Supreme Court of the United States, the law is still far from clarified.

to recover the money for a fee of \$175.00. Nothing further was done by the seaman, so there were no consequences and no one was hurt, according to the theory of respondent.

The argument has largely concerned itself with the question of whether it was the duty of the Assistant United States Attorney to represent a seaman or the Government in such matters. But here again the position of Patterson has the same vice noted in the incidents just considered. If his duty was to the United States, he should not have represented the seaman at all. If it was his duty to represent the seaman as a ward of the court, he had no right to bargain for a fee for his services. But Patterson was dealing with a parolee,⁴ sent to him by a fellow officer of the United States for advice.

The unethical nature of Patterson's conduct in this transaction is apparent. The courts cannot function if their wards or those dependent upon them for protection are considered legitimate objects for prey by their officers. A parolee is at the mercy of the Probation Officer and the United States Attorney and his assistants. If their directions are not obeyed, a case could be made to send the parolee back to prison. The idea of making a charge for legal services to such a ward under such circumstances is entirely repugnant to the ethical

⁴ Technical objection was made to a consideration of this fact which the record shows was known to Patterson, but the offer of the court to open proceedings was refused. The confidential file of the Probation Officer, although not taken into consideration here, is available to attach to the record.

concepts. Thereby, Patterson violated his official duty to the United States and a duty to the ward of the court.

Finally, Patterson was required to prosecute one Costello. Upon request, he recommended Klepper, his partner, to Costello as an attorney. Costello hired Klepper, eventually paying him a fee. Patterson did not withdraw as prosecuting officer and have the case assigned to another Assistant United States Attorney. Patterson, Klepper and Costello came before the court. Patterson related the story of the violation as Assistant United States Attorney. Klepper told of the mitigating circumstances relating to this recidivist, and asked for probation for him. The judge asked Patterson for a recommendation, and the latter replied that he had none to make, but did not suggest that the refusal was based on the fact that Costello was represented by his own associate. Upon his plea, which Patterson did not oppose, the judge granted the request.

The parolees, probationers and defendants charged with crime are under the protection of the court, its judges, probation officers and also of the prosecuting and investigating officers of the United States. This protection, always present in theory since the adoption of the first ten amendments to the Federal Constitution, has been given hardening reality by recent opinions of the Supreme Court of the United States and other federal courts. Trial judges, whether willing or no, have been required to scrupulously protect the rights of defendants brought before them. Where those in an official

capacity have misled or oppressed a defendant without knowledge or possibility of knowledge by the judge, the result has been the same.

A conviction has been set aside where the trial judge failed to appoint different lawyers for two defendants whose interests were opposed.⁵ Here it is true the Assistant United States Attorney and his associate obtained a disposition of the cause for a fee to the associate which accorded with the wishes of the defendant. But if defendant had been committed to a penitentiary or had been dissatisfied with either the sentence or the fee charged, an unassailable basis for release on habeas corpus was presented.

In *Whaley vs. Johnson*, 316 U. S. 101, it was laid down that threats and intimidation practiced by an officer of the Federal Bureau of Investigation, coercing a defendant to plead guilty, would be sufficient basis for setting aside pleas and sentence, although the matter had never been brought to the notice of the sentencing judge. It is true *Costello* has never complained of his sentence, a circumstance which might indicate that he got what he paid for and that only society and the United States suffered. But if he had sought relief from the sentence, the Supreme Court could scarcely have denied it if the facts here admitted were shown.

This point is further illustrated with specific regard to an Assistant United States Attorney in *Walker vs. Johnson*, 312 U. S. 275, 286, where it was held that, even in the absence of knowledge of

⁵ *Glasser vs. U. S.*, 315 U. S. 60, 75, 76.

the sentencing judge, a defendant would be entitled to habeas corpus "if he was deceived⁶ or coerced by the prosecutor into entering a guilty plea," since thereby "he was deprived of a constitutional right."

In *Michener vs. Johnson*, 141 F. 2d 171, on habeas corpus, where the trial court found on the basis of depositions of a treasury agent and an Assistant United States Attorney that defendant had voluntarily waived counsel, although nothing was called to the attention of the trial judge, the Court of Appeals of the Ninth Circuit remanded the cause to take testimony as to whether these officials had concealed from defendant the fact that he was entitled to counsel on arraignment, and that there were two counts of the indictment.

The effect of legal advice given only by agents and officials of the Government is illustrated by a few excerpts from the case of *Von Moltke vs. Gillies*, 332 U. S. 708, 725:

"Before pleading guilty this petitioner undoubtedly received advice and counsel about the indictment against her, the legal questions involved in a trial under it, and many other matters concerning her case. This counsel came solely from government representatives, some of whom were lawyers. The record shows that these representatives were uniformly courteous to her * * * she appears to have developed great confidence in them * * *.

"The Constitution does not contemplate that prisoners shall be dependent upon government

⁶ Emphasis ours.

agents for legal counsel and aid, however conscientious and able those agents may be.”

The position of a prosecuting officer for the United States is one of great power and influence and the actions of the holder of the office to a large extent are not under scrutiny of the court. Therefore, it is subject to great abuses if held by the untrustworthy or unstable.

The integrity and freedom from suspicion of prosecuting officials and judges are justly bracketed as requiring the respect and support of the courts and their officials by members of the bar by Stephens, Associate Justice, concurring in *Duke vs. Committee on Grievances of the Supreme Court of the District of Columbia*, 82 F. 2d 890, 896.

An able Federal Judge, Mac Swinford, disbarred a state prosecutor from practice in the United States District Court of the Eastern District of Kentucky, because he failed to perform his sworn duty to prosecute violators of state laws. In the course of the opinion,⁷ there was quoted an excerpt from *State vs. Hays*, 64 W. Va. 45, which is particularly apt here:

“No one will deny the power and duty of a court to strike from the roll the name of one who fails to maintain fidelity to the personal trust of a single client’s interest. How much more important is the duty to exercise this power when the infidelity or misconduct relates to an attorney charged not only by the honor and oath of an attorney at the bar, but also by the dignity and oath of a pub-

⁷ *Wilbur vs. Howard*, 70 F. Supp. 930, 936.

lic official, in an office calling for the exercise of highest qualities as an attorney! * * * It is impossible to say that what one does as prosecuting attorney is not done as an attorney. It is done in his professional relation to the people, as well as in his official relation. * * * ”

There are paramount duties imposed upon lawyers who are admitted to the bar of a court. One of these is absolute loyalty to the interests of a client. Another, equally important, is that the lawyer must, without regard to any consideration personal to himself, guard the interests of the defenseless and oppressed. The record is clear. Patterson did not respect either of these obligations.

He still does not understand the nature or magnitude of his derelictions. He has prevailed upon a prominent lawyer of this bar, apparently by appeal to the obligations of members of the bar to their fellows and to the profession, to urge a minor penalty. But neither the loyalty of his chosen counsel nor sympathy which we have for an erring member of our profession can prevail in the face of the record.

It is with sorrow that the writer records the fact that, although he had no personal knowledge of the matters except through the record and these proceedings, the writer could feel disqualified to hear a case in which Patterson appeared as counsel because the matters of record are so prejudicial to Patterson that the writer would be unable to have confidence in any representations or contentions made by him.

It is well known that the federal bar is not as well knit and as homogeneous as the bar of the states and localities. Discipline in the federal courts is extremely difficult of administration because the judges do not have the intimate contact with the lawyers who practice before them. The integrity of the federal trial courts has been based upon the respect given them by the bar. If this fails, the courts fail. It is true, judges are products of a hardy climate, but they should not have to fear attacks from behind by traitors to the high ideals of the profession.

The findings and decree of disbarment will be entered.

McColloch (District Judge).

The thing about this case that has always impressed me the most is the incident about the parolee. It is absolutely not to be tolerated that any officer of the court shall take personal advantage of the acquaintance which his official position gives him with probationers and parolees; and exploitation of them comes worst from a member of the staff of the United States Attorney.

/s/ CLAUDE McCOLLOCH.

[Endorsed]: Filed March 10, 1949. Lowell Mundorff, Clerk.

[Endorsed]: Filed March 12, 1949. Paul P. O'Brien, Clerk.

No. 12175

**In the United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT**

N RE J. ROBERT PATTERSON, {
 Appellant }

APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the United States
District Court for the District of Oregon

HON. JAMES ALGER FEE,
HON. CLAUDE MCCOLLOCH,
Judges.

B. A. GREEN,
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FILED

APR 27 1949

PAUL P. O'BRIEN,
CLERK



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**In the United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT**

IN RE J. ROBERT PATTERSON, }
 Appellant }

APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the United States
District Court for the District of Oregon

HON. JAMES ALGER FEE,
HON. CLAUDE MCCOLLOCH,
Judges.

JURISDICTIONAL STATEMENT

This proceeding was instituted by the Standing Committee on Discipline to the District Court of the United States for the District of Oregon. The complaint alleged certain allegations of alleged wrongful and unprofessional conduct committed by the appellant and prayed for appropriate action by the District Court including disbarment from the United States District Court for the District of Oregon if the District Court felt the same was appropriate (R. P 2). A judgment of disbarment from practice in the District Court of

the United States for the District of Oregon was entered against the appellant by the District Court (R. P 30). The District Court has jurisdiction to discipline its attorneys, where it has power to admit attorneys to practice, including the power of disbarment. *Bradley vs. Fisher*, 13 Wall 335, 20 L. Ed. 646, 80 U. S. 335.

The Circuit Court of Appeals has Jurisdiction to review the District Court's Judgment by reason of the following statutes: Sect. 225 (a) U.S.C.A. Tit. 28—Judicial Code and Judiciary.

“The Circuit Court of Appeals shall have appellate jurisdiction to review by appeal or writ of error final decisions:

“First—In the District Courts in all cases save where a direct review of the decision may be had in the Supreme Court under Section 345 of this title.”

STATEMENT OF THE CASE

J. Robert Patterson was admitted to practice law before the Courts of Oregon in September 1941 (R. P 77). In October 1944, after serving in the Maritime Service during the war, he became associated with Milton R. Klepper in Portland, Oregon (R. P 78). At this time he was 27 years of age. Mr. Klepper had practiced in Portland for some thirty years after graduating from Columbia University in New York (R. P 97, 98). Patterson was born in Oregon and attended Pacific University and University of Oregon for two years. He then obtained employment with the First National

Bank of Portland and finished his law education at Northwestern College of Law, a night school, working during the day (R. P 78). His father was a brick mason. On May 21, 1945, having had only a few months actual experience in the practice of law, the appellant accepted employment as an Assistant United States Attorney for the District of Oregon (R. P 80). On July 2, 1945, he was admitted to practice before the United States District Court for the District of Oregon. After becoming Assistant United States Attorney he retained his office with Klepper and was privileged to engage in private practice (R. P 22).

Prior to accepting employment with the United States Attorney's office the appellant was paid \$50.00 a week by Klepper. Mr. Klepper also paid all overhead and received one half of fees from Patterson's private practice. After accepting his position as Assistant United States Attorney the arrangement was continued as before, with the exception, that Patterson did not receive any compensation from Klepper (R. P 135). Commencing October 2, 1946, the appellant, Klepper and Mr. McDannell Brown began doing business under the assumed name of Klepper, Brown and Patterson (R. P 96). No written or oral agreement was entered into whereby the parties received a definite division of income, nor did the parties share expenses in any exact ratio. An assumed name certificate was filed at this time and all business was subsequently conducted under

the firm name. On January 1, 1948, a definite partnership agreement was entered into between appellant and Klepper. On April 23, 1948, due to a heart attack, Mr. Klepper died. The dates as set forth are important because of the relationships that existed between Klepper and Patterson on the different occasions.

The facts surrounding the first act of alleged misconduct are as follows: The appellant was consulted by one Marvin L. Hughes, in connection with an injury he had received while a *passenger* on a vessel operated by the Alaska Steamship Co. and owned by the United States of America. On October 8, 1945, the appellant and Klepper filed a complaint in the District Court of the United States for the District of Oregon against the Alaska Steamship Co. The Defendant Alaska Steamship Co. filed an answer and as a separate defense set out that they were only agents of the United States and were therefore not liable. Patterson and Klepper tried the action without a jury before Hon. Claude McColloch and a judgment was entered in behalf of the Defendant. No appeal was taken from the judgment. No specific basis for the decision in the Defendant's favor was given by the Court (Exhibit 2). Hughes was advised by Patterson that in the event he desired to prosecute his claim further and specifically against the United States under the Suits in Admiralty Act, it would be necessary to seek other counsel and of the time within which this could be done (R. P 126, 127).

The facts surrounding the Second Charge of unprofessional conduct are: The Appellant had acted as counsel for one, J. Westley Bowden, for about two years and acted as counsel for him in an action brought by his wife against him for divorce (R. P 85). While the divorce action was pending, Bowden's wife was killed by an explosion of dynamite and Bowden was charged with murder in the 1st degree by the State of Oregon. It was contended Bowden set a trap for his wife (R. P 132). Patterson acted as counsel for Bowden but secured the service of Edwin D. Hicks, who was employed as chief counsel. Patterson took no active part in the trial with the exception of the cross examination of one minor witness. He did sit at the counsel table throughout most of the trial. He took leave of absence from the office of United States Attorney while he was away from the office (R. P 87, 111). The United States Attorney, Mr. Henry Hess, had knowledge of the Bowden trial and Patterson's participation therein (R. P 128-130, 139-140, 142). The State's Attorney's office also had knowledge of Patterson's position as Assistant United States Attorney and made no objection (R. P 110). The Attorney General was subsequently informed fully regarding the matter (R. P 142). Patterson did accept a portion of the fee paid by Bowden for his defense (R. P 89).

The facts surrounding the third charge against Patterson are: Joseph Martin was referred to Patterson

by the United States Probation Officer in connection with Martin's desire to procure the release of certain funds deposited in the registry of the United States District Court at San Francisco (R. P 89-91). Martin had been charged with desertion from his ship during the war emergency and his wages earned as a Merchant Seaman pursuant to *46 U.S.C.A. Shipping Sec. 701, 706* had been paid over to the Clerk of the Court. Martin was also on parole for committing the crime of armed robbery while at Melbourne, Australia (R. P 65). It had been the practice in Oregon to represent such seamen in the Oregon Court in their effort to obtain the release of such funds (R. P 92). Such practice has now ceased because it has been learned the United States is an adverse party; *46 U.S.C.A. Shipping Sec. 706, 628* (R. P 150-151). Martin was advised of the method under which he might procure the release of his funds to wit: Secure the services of the United States Attorney or other private counsel in San Francisco. When Martin insisted he was not satisfied to accept said advice, Patterson advised Martin of the fact that he was engaged in private practice and advised Martin that he might consult with him at his private office, if he did not secure satisfaction elsewhere. Upon request Patterson advised Martin what he estimated a private attorney would charge Martin for performing such a service. Martin left and never contacted Patterson again either privately or through the United States Attorney's office (R. P 89-91).

The facts surrounding the fourth charge of misconduct against the appellant are: The Federal Grand Jury had indicted one Eugene Russell Costello, for violation of the Federal Narcotic laws, to wit: forgery of two narcotic prescriptions (Exhibits 3, 4). Patterson had presented the case to the Grand Jury in behalf of the Government. Costello's aunt called on Patterson and indicated that while her nephew desired to plead guilty it might be well to have an attorney make a statement in his behalf. Upon urging, Patterson gave the aunt the names of three attorneys, one of which was Milton Klepper (R. P 135). This entire proceeding took place while Patterson shared office space with Klepper but before any partnership or quasi-partnership was existing between them. Patterson did not participate in this fee or in any other fees collected by Klepper during this period of time. Klepper then made a statement in behalf of Costello upon his entry of a plea of guilty. Patterson related in full the details of Costello's offense and made no recommendation of punishment. The matter was referred to the United States Probationary Officer and upon his report Costello was given a suspended sentence and placed on probation. These proceedings took place before the Hon. Claude McColloch (Exhibits 3, 4).

The fifth charge of unprofessional conduct against the appellant comprises the following facts: On October 2, 1946 the Appellant, McDannell Brown, and Milton R. Klepper filed an assumed name certificate of Klep-

per, Brown and Patterson. Business was subsequently conducted under the partnership name. Stationery, the doors of their offices, pleadings, professional cards and all other legal documents indicated that the parties were partners. The parties appeared for each other and in conjunction with each other in matters of litigation. No written or oral partnership agreement existed for the division of profits, losses or a division of duties. On January 1, 1948 a regular partnership agreement was entered into between Klepper and Patterson and business was subsequently conducted under that name (R. 96, 99, 100, 103).

The Standing Committee on Discipline has made a recommendation that the appellant be permanently disbarred and that his name be stricken from the roll of attorneys entitled to practice before the District Court of the United States for the District of Oregon (R. P 18).

This appeal is from a judgment entered by the court so disbarring the appellant.

The foregoing is a concise statement of the facts surrounding the alleged acts of unethical and unprofessional conduct charged against Mr. Patterson.

ERRORS RELIED UPON

THE DISTRICT COURT ERRED IN ENTERING ITS FINDINGS AND JUDGMENT OF DISBARMENT FROM PRACTICE BEFORE THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON AGAINST APPELLANT BECAUSE THE EVIDENCE IS INSUFFICIENT TO JUSTIFY SUCH JUDGMENT AND FINDINGS.

A. First Proposition: What are the particular acts constituting an offense or misconduct which would justify disbarment, suspension or other disciplinary action?

POINTS AND AUTHORITIES

1. In order to justify disbarment the infraction or duty must involve moral turpitude and evince a depraved character that renders such person untrustworthy and a reflection upon the bar and the court as one of its officers.

Bartos vs. U.S., 19 F. (2d) 722, 727

Bradley vs. Fisher, 13 Wall 335, 80 U.S. 335, 20 L. Ed. 646

Ex parte Burr, 9 Wheat, 529, 20 U.S. 529, 6 L. Ed. 152

Ex parte Eastham, 46 Oreg. 475, 477, 80 Pac. 1057

In re Riley, 75 Okla. 192, 183 Pac. 728

In re Wilmarth, 42 S.D. 76, 172 N.W. 921

People vs. Baker, 311 Ill. 66, 142 N. E. 554

People vs. Hanson, 316 Ill. 502, 147 N.E. 431

State vs. Cutlip, 83 Okla. 183, 202 Pac. 782

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2. It must be shown that the attorney acted in bad faith.

In re Baum, 32 Ida. 676, 186 Pac. 927
In re Becker, 187 N.Y.S. 400, 196 Ap. Div. 914
In re Collins, 147 Cal. 8, 81 Pac. 220
In re Johnson, 27 S. D. 386, 131 N. W. 453
In re Smith, 365 Ill. 11, 5 N.E. (2d) 227
In re Williams, Mo. 1938, 113 S. W. (2d) 353
 5 *Am. Jur.* 425
 6 *C.J.* 590-591
 157 *A.L.R.* 607, 612
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3. The evidence must be clear and free from doubt.

In re Baum, 32 Ida. 676, 186 Pac. 927
In re Hadwiger, Okla. 1933, 27 Pac. (2d) 604, 610
In re McDonald, 204 Minn. 61, 282 N.W. 677
In re Mitgang, 385 Ill. 311, 52 N.E. (2d) 807
In re Shinin, 27 S.D. 232, 130 N.W. 761
In re Williams, Mo. 1938, 113 S.W. (2d) 353
Zachary vs. State, 53 Fla. 94, 43 So. 925
 40 *L.R.A. (N.S.)* 801

ARGUMENT

The question first to be considered is what particular acts constitute an offense or misconduct which would justify disbarment, suspension or other punishment. *Thornton, Attorneys at Law*, Vol. 2, p. 1187, states:

“The nearest approach to a precise definition which will cover the entire subject may be stated thus: An attorney is guilty of misconduct whenever he so acts as to be unworthy of the trust and confidence involved in his official oath, and is found to be wanting in that honesty and integrity which must characterize members of the bar in the performance of their professional duties. The misconduct, however, must be wilful.”

The law does not demand that every technical infraction of the law by an attorney shall require his disbarment, although, it is admitted that an attorney should endeavor to observe literally the law, but it is these infractions of duty involving moral turpitude and evincing a depraved character that renders such attorney untrustworthy and a reflection upon the bar and the court as an officer thereof that demands his disbarment. *In Re Riley, supra, State vs. Cutlip, supra.*

The Oregon Supreme Court has set forth the rule that in order to disbar an attorney from further practice, his conduct must have been such as to evidence his unfitness for that confidence and trust which attend the relation of attorney and client and the practice of law before the courts, or it should show such lack of personal

honesty or of good moral character as to render him unworthy of public confidence. *Ex parte Eastham, supra.*

Justice Field in the case of *Bradley vs. Fisher, supra*, set forth the rule that has been for many years followed and approved by other courts. He said :

“This power of removal from the bar is possessed by all courts which have authority to admit attorneys to practice. It is a power which should only be exercised for the most weighty reasons such as would render the continuance of the attorney in practice incompatible with a proper respect of the court for itself or a proper regard for the integrity of the profession. * * * Admission as an attorney is not obtained without years of labor and study. The office which the party thus acquires is one of value and often becomes the source of great honor and emolument to its possessor. To most persons who enter the profession it is the means of support to themselves and their families. To deprive one of an office of this character would often be to decree poverty to himself and destitution to his family.”

See to the same effect *Ex parte Burr, People vs. Hanson, People vs. Baker, In re Wilmarth, Bartos vs. U.S., all supra, Thornton, Attorneys at Law*, Vol. 2, p. 1187:

Where it appears that the accused acted in good faith without improper or corrupt motives and it is shown that no injury resulted to his client, cause for disbarment does not exist.

In re Collins, supra
In re Johnson, supra
In re Baum, supra
 6 C.J. 590-591

Again, it appears in *In Re Williams*, Mo. 1938, 115 S.W. (2d) 353:

“Professional misconduct as applied to a lawyer may be defined as the wilful and intentional commission of or omission to do or perform an act in connection with the practice of his profession and it must be such an act as constitutes a breach of duty to his client, the court, the public or fellow members of the profession. It must be something more than mere failure to live up to the ethics of a bar association. It must be a violation of private right or public good or it must possess an element of immorality or dishonesty.” Citing with approval 5 *Am. Jur.* 425.

Moreover, the proof must not only show the acts of misconduct but must clearly show that they were intended to defraud or deceive. The mere failure of an attorney to exercise good judgment in a transaction with his client due to his *inexperience* where no motive or intent to cheat or defraud is shown does not constitute ground for disbarment. *In re Smith*, *supra*. Moreover, when the acts complained of did not result in a loss to any of the parties interested and were done without any intent to injure anyone, suspension will not be warranted. *In re Becker*, *supra*, 157 A.L.R. 697, 712.

Thornton, Attorneys at Law, Vol. 2, P. 1189, states that:

“there seems to be no instance of an attorney having been removed because of his ignorance of the law unless such ignorance has been made manifest by some well defined misconduct which in itself is a ground for disbarment. In that case, of course, it may be assumed that ignorance will be no defense.”

It may be stated to be a well settled rule in disbarment proceedings that charges of official misconduct must be established by clear and undoubted preponderance of the evidence.

In re Shinin, supra
In re Baum, supra

Moreover, in order to warrant disbarment or suspension, the record must be free from doubt not only as to the act charged but also as to the motive with which it is done. A lawyer will not be subjected to discipline merely upon suspicious circumstances. The following cases state the rule that the court should proceed cautiously in depriving a lawyer of his professional license and the charges must be supported by convincing proof. See *In re Mitgang*, supra, *In re Hadwiger*, supra, *Zachary vs. State*, supra. The proof of the wrong-doing must also be cogent and compelling. *In re McDonald*, supra, *In re Williams*, supra.

With these well established principles in mind we will now turn to the discussion of each charge of alleged misconduct in order to see if the appellant's conduct justified disbarment.

B. Second Proposition: The evidence does not support a finding that the appellant was guilty of unprofessional conduct with reference to his actions in connection with the case of Marvin L. Hughes vs. Alaska Steamship Company.

POINTS AND AUTHORITIES

1. The Respondent acted in good faith.
2. Attorneys for private insurance companies defended such cases and not the United States Attorney's office.
3. No suggestion of impropriety was called to appellant's attention although the case was tried before a regular judge of United States District Court for the District of Oregon.
4. It has since been decided that a person in the position of Hughes does not have an enforceable claim against anyone.

John H. Arnestal vs. U. S. of Am. & Alaska S. S. Co. 1946 A.M.C. 1364

In re Baum, 32 Ida. 676, 186 Pac. 927

Calderola vs. Eckert, 91 L. Ed. 1968, 67 S. Ct. 1569, 332 U.S. 155

In re Collins, 147 Cal. 8, 81 Pac. 220, 223

Hust vs. Moore-McCormack Lines, Inc., 90 L. Ed. 1534, 66 S. Ct. 1218, 328 U.S. 707

Thornton, Attorneys at Law, Vol. 2, P. 1213

ARGUMENT

The first allegation of the appellant's misconduct refers to the fact that he filed a complaint in this court on behalf of Marvin L. Hughes, plaintiff, vs. Alaska Steamship Company, a corporation, defendant, and thereafter prosecuted said cause to a conclusion although he well knew one of the principal defenses that would be urged by the defendant was that the plaintiff's claim, if any, should be asserted against the United States of America, whom he was not in a position to sue because of his office as Assistant United States Attorney (R. P 3). It is alleged that the appellant was guilty of misconduct in this regard for the reason that he represented conflicting interests. It has many times been stated that it is improper for an attorney to represent two parties in an action where it is his duty on behalf of one party to contend for that, which on the behalf of the other, it is his duty to oppose. The evidence disclosed that the appellant as Assistant United States Attorney did not appear in behalf of the United States of America in cases brought pursuant to the Suits in Admiralty

Act and that they were defended by private lawyers representing the insurance carriers (R. P. 84). Can it seriously be contended that the appellant fraudulently and intentionally violated his oath of office or other rules of professional conduct in such a manner as would shock the conscience of the court or other members of the profession when he represented a party against another private litigant?

In the case of *Hust vs. Moore-McCormack Lines Inc.*, supra, it was urged by the defendant that if the plaintiff had any cause of action, it was against the United States of America under the Suits in Admiralty Act. In this case a *seaman* sued the general agent for injuries which he received on a vessel operated by the general agent but owned by the War Shipping Administration. The provisions of the general agency contract were considered in that case and it was decided by the U.S. Supreme Court that the general agent was responsible for the operation of the vessel. The general agency contract provided that the general agent should "manage and conduct the business of the vessel, maintain the vessel in an efficient state of repair and to exercise reasonable diligence in making inspections for that purpose." In the Hughes case instituted by Patterson, the action was based on the failure of the agent to make repair or to make inspection of a bunk bed which collapsed while the plaintiff was lying on it, causing him serious personal injuries. It is urged that the appellant acted as a

reasonable person in bringing the action against the general agent. Surely it cannot be contended that he intentionally brought the suit in bad faith and did not have reasonable grounds upon which to rely when he instituted such suit.

In order to entail the consequences of representing conflicting interests it should appear that there were antagonistic interests in fact and which the attorney assumed to represent, and it should further appear that in assuming this relation to both sides of a controversy the attorney was acting from a corrupt motive or with evil intent and that by reason of such conduct some injury or wrong was sustained by the parties interested. An attorney might appear upon the record as representing all of the parties in a suit with their consent and no exception could be taken to it as against the attorney. *In re Collins*, supra.

It appeared that Hughes, the plaintiff, whom the appellant represented, was a *passenger* on a War Shipping Administration ship operated by the defendant, Alaska Steamship Company, and was returning from Alaska to the United States as a *passenger* (*R. P 23*).

In *Hust vs. Moore-McCormack*, supra, Justices Douglas and Black in a special concurring opinion held that the Alaska Steamship Co. would be responsible under the *pro hac vice* rule. True, in *Calderola vs. Eckert*, supra, the majority opinion (five concurring) held

that the *pro hac vice* rule did not apply. But Justices Douglas, Rutledge, Black and Murphy reaffirmed the rule. Surely a man cannot be guilty of misconduct warranting disciplinary action when misconduct arises solely as a question of law and when at least four judges of the Supreme Court of the United States concur in the theory adopted by the accused.

It has since been held that under an identical situation the passenger seeking recovery of damages for personal injuries alleged to be due to the defective condition of the vessel is barred from recovery as against both the United States and the private operator on his right of recovery in tort. The court, however, in this case, under its own opinion, stated that he was somewhat in doubt as to his conclusion. *John H. Arnestal vs. United States of America, and Alaska Steamship Co.*, 1946 A.M.C. 1364. Therefore by judicial decision it has now been made clear that there was no conflict in interests because Hughes had no claim against the United States. Moreover, *Thornton, Attorneys at Law*, Vol. 2, p. 1213, lays down the rule thus:

“But the acceptance of a retainer from persons whose interests are adverse to those of the client under a mistake of fact will not justify disbarment, nor is the attorney guilty of unprofessional conduct for failing to disclose to his client all of his connections with antagonistic interests especially where the client has been informed of the essentials and the attorney has reason to believe that the client is familiar with the facts.” (See also *In re Baum*, *supra*.)

Surely, under the circumstances and evidence as disclosed in this regard the appellant cannot be said to have intentionally and with a corrupt motive represented the plaintiff Hughes in the action against the Alaska Steamship Company.

C. Third Proposition: The evidence does not support a finding that the appellant was guilty of unprofessional conduct with reference to his actions in appearing in behalf of the defendant in the case of the State of Oregon vs. J. Westley Bowden.

POINTS AND AUTHORITIES

1. The appellant served only in a nominal capacity.
2. The appellant acted in good faith and only after full disclosure of facts to everyone.
3. No suggestion of impropriety was called to the appellant's attention.
4. Appellant never was a witness in behalf of Bowden and it was only a bare possibility that he might be called to testify briefly on a collateral matter.

Hunter vs. Troup, 315 Ill. 293, 146 N.E. 321

In re Becker, 203 N.Y.S. 437, 208 App. Div. 224

In re Holden, 110 Vt. 276, 4 At. (2d) 882

In re Mitgang, 385 Ill. 311, 52 N.E. (2d) 807

In re Wakefield, 107 Vt. 180, 177 At. 319

ARGUMENT

The second charge of misconduct against the appellant is that he accepted employment by one, Westley Bowden, who was charged in the Circuit Court of the State of Oregon for Multnomah County with the crime of murder, and that he represented the said Westley Bowden at the trial and accepted a fee therefor although he expected to be called as a witness in the trial of the said Bowden and although the Attorney General's Manual covering the conduct of United States Attorneys directs that the United States Attorneys *shall not* represent a person charged with a crime in a state court (R. P 3).

Attention is directed to the Attorney General's Manual, which, rather than in the language of a direction or order, states that United States Attorneys and their assistants *should* not represent a person charged with a crime in a state court (R. P 9, 159). This is in the interest of cooperation between the two prosecuting agencies and for other obvious reasons. However, the evidence disclosed that the appellant took a very nominal part in the defense of Bowden and secured the services of another competent attorney who was in charge of Bowden's defense. The evidence further disclosed that the respondent was at no time familiar with the provisions of the Attorney General's Manual nor were these provisions called to his attention (R. P 88, 89, 128, 140, 141, 142). The evidence showed that all of the proceed-

ings were open and that the appellant did not attempt to cover up or hide the fact that he represented Bowden (R. P 120, 130). We submit that the conduct of Assistant U.S. Attorneys as laid down by the Attorney General's Manual is at most an interdepartmental ruling and does not involve a question of ethics.

One of the questions involved in this charge is whether or not the respondent represented conflicting interests. In other words, if it was his duty to prosecute the defendant for the offense committed then it can be said that it would be improper for him to attempt to defend the same person. Duties of the respondent as Assistant United States Attorney concerned both civil and criminal cases but did not include crimes committed against the State of Oregon unless at the same time they were also crimes against the United States. It has been shown by the evidence that the District Attorney of Multnomah County was fully informed as to the position taken by the appellant in behalf of Bowden and that no attempt was made by the appellant to use his position to an advantage nor was it disclosed to the jury during the trial or at any time (R. P 114).

It is further alleged that the appellant was guilty of misconduct in this same regard for the reason that he expected to be called as a witness at the trial. The canons of the American Bar Association on professional ethics and grievances set forth that an attorney cannot properly accept employment in connection with a case

if he *knows* that he will be an essential witness. While the canons of ethics do not have the effect of a statute, nevertheless they constitute a safe guide for professional conduct and the court may punish an attorney for his failure to observe the same. *Hunter vs. Troup*, supra, *In re Mitgang*, supra. However, the evidence in this case disclosed that there was no certainty that the appellant would be called as a witness and that even if he were, the testimony that he would have given would have been as to rather minor and collateral matters. It further appears that in fact the appellant never was called as a witness nor did he take the stand at any time during the entire proceedings (R. P 111, 124). In the case of *In re Obartuch*, 386 Ill. 323, 54 N.E. (2d) 470, the court said that in a case where the defendant was appearing as an attorney and also testified as a witness that the practice of appearing in such a dual capacity had been condemned in many cases, but that this fact alone was not sufficient upon which to base a disciplinary action. *In re Holden*, 110 Vt. 276, 4 At. (2d) 382, was a proceeding to disbar the defendant where it appeared that he actively participated in the trial of a case as an attorney and also became a witness and testified for his client as to material and disputed matters. It was not found, however, that the defendant had any intent to deceive and the proceeding was dismissed with a reprimand.

It is not contended that the appellant used his connection with the United States Attorney's office in ob-

taining information or evidence to use in behalf of Bowden. See *In re Becker*, supra. Surely, it cannot be contended that the appellant's conduct in this regard measures up to the rule that was laid down in the following case: *In re Wakefield*, supra, where the district attorney of a county appeared before the State Liquor Control Board in behalf of a client in his private capacity. It appeared that the client had violated the state law and the attorney was informed that he would be asked to prosecute the client for violation of the criminal law. It was held that the act of the district attorney was unethical and he was suspended for three months.

It was brought out in the proceedings that the appellant failed to take administrative steps to secure the approval of the Attorney General. However, it has been shown from the evidence that all of the facts were reported to the Attorney General and that the appellant was not discharged from his office as an Assistant United States Attorney by the Attorney General (R. P 80, 1420). In view of the fact that it is charged that the respondent is guilty of misconduct of such a serious nature as to warrant suspension, then certainly a violation of the same rule promulgated by the Attorney General should be grounds for discharge from office. It is seriously and strongly urged upon the court that there is no evidence to show that the appellant wilfully and intentionally violated either the Attorney General's standard of conduct or any of the canons or rules of profes-

sional ethics. The record reveals that his superiors and associates did not even admonish him against sitting through the Bowden trial although the facts were fully known to them (R. P 128-29, 139).

Even the portion of the fee accepted by Patterson was less than that which, under the rules of the Oregon State Bar Association, he would have been entitled to receive by forwarding or referring the business to another attorney (R. P 110). Surely, his conduct was not such as to shock the conscience of the court or other members of the legal profession. It would appear that at all times his motives were good and that he, in heart at least, felt duty bound to Bowden, whom he had represented for some long period of time, to defend him in at least a nominal capacity. Appellant asserts that had the matter at any time been called to his attention, he would have taken immediate steps to correct the same.

D. Fourth Proposition: The evidence does not support a finding that the appellant was guilty of unprofessional conduct with reference to his actions in connection with Joseph Martin's efforts to procure the release of certain funds on deposit in the registry of the United States District Court at San Francisco.

POINTS AND AUTHORITIES

1. The appellant acted in good faith in his attempt to help Martin.

2. It has since been determined that the United States Attorney's office is an adverse party in such proceedings.
3. Patterson gave Martin the advice which he sought
State vs. Smith, 84 W. Va. 59, 99 S.E. 332
Thornton, Attorneys at Law, Vol. 2, P 1254, 46
 U.S.C.A. Shipping Sec. 701,706.

ARGUMENT

The next charge against the appellant is that he was guilty of misconduct for the reason that he offered to represent one Joseph Martin for a fee in connection with a proceeding to procure the release of certain wages earned by the said Joseph Martin in the amount of \$1,150.00, which were deposited in the registry of the United States District Court at San Francisco, California, although the said Joseph Martin was referred to him in his capacity as Assistant United States Attorney and that such matters were customarily handled by United States Attorneys without compensation therefor (R. P 3, 4).

The evidence disclosed that Martin was referred to the appellant by the United State Probation Office and that Martin had been charged as a wilful deserter from a vessel while at a port in Australia. Martin, after deserting the ship, was charged with a crime, in addition to that of desertion and was brought back to the United

States and placed on probation. The money he had earned as wages on the ship, in the meantime had been paid into the registry of the court at San Francisco. Evidence disclosed that appellant advised Martin that, in his opinion, the only way for him to seek the return of his money was to go to San Francisco and present himself at the United States Attorney's office or to secure private counsel in San Francisco. After Martin had advised the appellant that he did not wish to go to San Francisco, Patterson inquired as to whether or not Martin had an attorney in Portland, and when advised that Martin's brother had counsel in Portland, *he advised Martin to seek the advice of his brother's attorney.* It was only after Martin hesitated in taking his advice and seemed hesitant in doing as the appellant advised him that Patterson mentioned that, in the event he did not receive satisfaction, and, if he cared to do so, he could talk with the appellant in his private offices in the Yeon Building. Patterson at this juncture gave Martin one of his business cards. Martin then inquired as to the amount of attorney's fee that an attorney might charge him for this work, and the appellant advised Martin that it was impossible to estimate the attorney's fee that would be involved for it would depend upon the amount of work done, but that in all probability the fee would be approximately \$175.00 (R. P 89, 92). It would appear, therefore, that at all times the appellant was interested in helping Martin and solicitous of his welfare. It appears that at all times the advice

that appellant gave Martin was good advice and nothing was done to deceive Martin or to advise him falsely in the premises. The evidence disclosed that at all time the appellant was interested in doing what he could for Martin and was free from any corrupt or fraudulent motives (R. P 91).

While it is not admitted by Patterson that there was any attempt or intent to solicit employment from Martin, nevertheless it is interesting to point out that all soliciting of employment by an attorney will not under all circumstances justify his disbarment or suspension. In order to justify such a result, such solicitation must be in a dishonorable or disreputable manner. Where it consists of a mere effort to procure employment in an honorable way, for legitimate purposes, it is not ground for suspension or disbarment. *State vs. Smith*, 84 W. Va. 59, 99 S. E. 332.

Thornton, Attorneys at Law, Vol. 2, p. 1254, sets forth the rule:

“A mere effort to procure employment in an honorable way and for legitimate purposes is not a sufficient ground for disbarment and may not even be censurable.”

The evidence disclosed that it had been a custom in the United States Attorney's office in Portland, Oregon, to represent seamen gratuitously in their efforts to secure wages which had theretofore been paid into the registry of the court. However, the evidence was just

is clear that it had never been the custom or practice to attempt to represent such a seaman in any district other than Oregon, and that since this proceeding the Attorney General has instructed the United States Attorneys that they are an adverse party in such proceedings and should appear in opposition to the seamen for the reason that money declared forfeited under such circumstances reverts to the Treasury of the United States to form a fund for the relief of sick and disabled and destitute seamen belonging to the United States Merchant Marine Service. *46 U.S.C.A. Shipping Sec. 01, 706 (R. P 151-152, 154-155).*

The complainant in this connection has referred to the opinion No. 211, March 15, 1941, issued by the Committee on Professional Ethics and Grievances of the American Bar Association. This refers to fees and solicitation of employment for advice and service to registrants under the Selective Training and Service Act of 1940. At no time could Martin be considered a member of the military, naval, or marine service of the United States nor was the advice which he sought with reference to any service or claim under the Selective Training and Service Act. The evidence disclosed that after Martin hesitated in taking the advice given by Patterson; the appellant gave Martin a business card and told him he would be glad to see what he could do for Martin if he was unable to obtain satisfaction elsewhere. Surely, where the appellant was of the honest opinion that he

could do nothing for Martin in his official capacity as Assistant United States Attorney and where Martin refused to heed his advice, the giving of the business card was not such an act of misconduct as would shock the conscience of the court or other members of the legal profession so as to justify disbarment or suspension.

The court's opinion states :

“Patterson offered, as a private attorney, to attempt to recover the money for a fee of \$175.00 (R. P 211, 212).

The facts are as disclosed by the record that Patterson never at any time accepted or offered to accept any fee from Martin. Martin was told to go to San Francisco and secure services of the United States Attorney or other private counsel. He was also advised to consult with his brother's counsel in Portland. The relationship of attorney and client never existed.

E. Fifth Proposition: The evidence does not support a finding that the appellant was guilty of unprofessional conduct with reference to his actions in connection with the case of the United States vs. Eugene Russell Costello.

POINTS AND AUTHORITIES

1. The appellant was not a partner of Milton Klepper at the time Klepper represented Costello.

2. The appellant acted in the utmost good faith and no attempt was made to deceive the court.
3. The court knew of the relationship between appellant and Klepper at the time.

In re Johnson, 27 S.D. 386, 131 N.W. 453

In re Lyons, 162 Mo. 688, 145 S.W. 844

Thornton, Attorneys at Law, Vol. 2, P. 1258

ARGUMENT

The fourth act of misconduct charged against the appellant is that he appeared in the above-entitled court as Assistant United States Attorney and represented the United States of America against Eugene Russell Costello although he was then associated in the practice of law with Milton R. Klepper, who appeared in said proceedings representing the said Eugene Russell Costello (R. P 4).

The evidence disclosed that the appellant was associated in private practice with the said Milton R. Klepper in that he had private offices in the same suite of offices with the said Klepper, but at no time during the pendency of this Costello proceeding was Patterson in any way a partner of the said Milton R. Klepper nor did the appellant and Milton R. Klepper represent that they were partners (R. P 94-96). In fact, it is alleged in the fifth allegation of misconduct on the part of appellant that the said respondent never was at any time, to the

present date, a partner of the said Klepper (R. P 4). In the case of *In re Lyons*, 162 Mo. 688, 145 S.W. 844, the exact situation was before the court. In that case a state statute prohibited a partner of any prosecuting or assistant prosecuting attorney from defending any person charged with a misdemeanor or felony whom by law such prosecutor or assistant prosecutor was required to prosecute. It was held that this statute applied only to state prosecuting attorneys and not to United States District Attorneys. Where no partnership existed between a United States Attorney and an Attorney occupying the same office and associated with him in civil business, the fact that to the knowledge of the District Attorney the other attorney was retained to defend a person accused of a crime in the United States District Court does not justify the disbarment of the district attorney. The court pointed out that had the evidence shown that they were dividing fees and were actually partners, it would have justified disbarment. The court stated :

“A partnership between public prosecutors and another lawyer in civil business is not unlawful nor is it improper and we have not been advised of any federal statute against it. * * * It has not been thought to be necessary for them to sever such relations while in office although, of course, the partner obeys the statute as well as his own sense of propriety and does not defend in criminal cases. So therefore in order to support this charge it is necessary that the evidence should show that they were partners when Davis was defending Martin.”

In view of the fact that the evidence showed that they were merely associates and not partners, the proceedings were dismissed.

In the case of *In re Johnson*, 27 S.D. 386, 131 N.W. 453, it appeared that the defendant was a state's attorney and employed one Auldridge in his private office. After investigating a criminal case, the complainant came to the defendant and asked him to represent him in a civil suit. The defendant refused to do this and suggested other attorneys and among them, Auldridge. Auldridge took the case and without any assistance of the defendant prosecuted it to conclusion. The defendant received no compensation from it. The court held that, in the absence of evidence that the proceedings were taken from improper motives or for an improper purpose, the charge against the defendant of unprofessional conduct was not sustained.

Thornton on Attorneys at Law, Vol. 2, p. 1258, cites with approval the leading case of *In re Lyons*, *supra* and states:

“But the fact that the district attorney occupies the same office with another attorney and is associated with him in civil business and that such other attorney has been retained to defend persons accused of crime in the courts wherein the district attorney officiates does not justify disbarment of the latter.”

It is not seriously contended by the complainants that any advantage was taken of the court or that the appel-

lant acted fraudulently or sought to mislead the court. The defendant Costello pleaded guilty and all of the facts concerning the crime were submitted to the court both through Patterson and the probation office, which made a thorough investigation of the Defendant's record and character. It is admitted that the appellant may be subject to criticism when he suggested Milton R. Klepper's name as one of three attorneys whom the defendant's aunt might seek for legal advice, but that at all times his intentions were good and that at no time did he seek to mislead the court or to act with corrupt motives. It is urged that conduct of the respondent in this regard is not ground for disbarment or suspension.

The court in its opinion states :

“The judge asked Patterson for a recommendation and the latter replied that he had none to make, but did not suggest that the refusal was based on the fact that Costello was represented by his own associate. Upon his plea, which Patterson did not oppose, the judge granted the request.” (R. P 213.)

The record discloses that only after a full investigation was the defendant Costello placed on probation. The basis for granting probation is disclosed in the transcripts of the proceedings (Ex. 3, 4) wherein the following statement of the court appears :¹

Footnote 1 “A man of the disposition I am, in approaching the disposition of these cases, who bases his action not only on the opin-

ion of many people and who the people are makes a good deal of difference. Now this is a borderline case, I will say, and what I am going to do may not be satisfactory to everybody interested, and it may not turn out to be the right thing to do, but you have expressed your opinion. *I have known you for a long time. You are a man of standing in the profession, having had long experience. You have raised a family of your own, a lovely family.* You tell me you think one more chance given to this defendant he might stand up, and so I am going to let that be *the scale with me* and I am going to give him the chance, but I am going to do this: I am going to pass a sentence now and definitely suspend it so he will know and you will know, and everybody interested will know, what the consequences will be if he does not make the grade this time. I have in my mind the period of sentence, but I would like a suggestion from you, Mr. Cochran, as to what the period of probation would be, five years or more?"

The appellant and Klepper had appeared in the Hughes case and in other cases together before the Costello matter came before the court. As disclosed by the Exhibits No. 6, 7, 8, 9, 10, 11, 12 introduced in this case it was apparent to the court of the relationship which existed between Klepper and Patterson. Both the Hughes case and the Costello hearing were heard before the Hon. Claude McColloch. For the court to now

say they had no knowledge of such relationship is not supported by the evidence.

F. Sixth Proposition: The evidence does not support a finding that the appellant was guilty of unprofessional conduct with reference to his actions in connection with the carrying on the practice of law under the firm name of Klepper, Brown and Patterson.

POINTS AND AUTHORITIES

1. At least a quasi-partnership existed between Klepper, Brown and the appellant after they had begun doing business under the firm name.
2. No one was misled, overreached or prejudiced on account of the appellant's, Brown's or Klepper's actions.
3. Klepper and Patterson on January 1, 1948 formed a general partnership.
4. The appellant acted in good faith.

In re Gluck, 123 NYS. 857, 139 Ap. Div. 894

In re Hertz, 139 Minn. 504, 166 N.W. 397

In re Kaffenburgh, 188 N.Y. 49, 80 N.E. 570

In re Scott, 52 Nev. 78, 292 Pac. 291

40 *Am. Jur. Partnerships*, P. 146, 153

7 *C.J.S. Attorney and Client*, 838 Note 19

47 *C.J. Partnership*, 672

Thornton, Attorneys at Law, Vol. 2, P. 1252

ARGUMENT

It is next alleged that the appellant was guilty of misconduct in that he permitted and consented to carrying on the practice of law under the firm name of Klepper, Brown & Patterson and holding himself out as a partner when in fact he was not such a partner (R. P 4). It appears from the evidence that the appellant began the practice of law in October of 1944, after having served with the U. S. Maritime Service during the war years (R. P 78). Until he went into the United States Attorney's office, which was in May of 1945, he was paid a salary by the said Milton R. Klepper and worked for him in connection with the carrying on of his legal business (R. P 95). After going into the United States Attorney's office and until October 2, 1946, the appellant maintained his private office with the said Milton R. Klepper and was associated with him in the practice of law. It appears that on the latter date the parties, having gained mutual confidence in each other and in order to facilitate their own practice, decided to do business under the firm name as alleged in the complaint (R. P 96). The evidence disclosed that Klepper and the other partners performed legal services for each other, tried cases in behalf of the others' clients, but that the said appellant had no written or other stated agreement as to the amount of compensation he would receive for the work performed by him for the other partners' clients (R. P 100-106). It was specially understood that he was to receive half of the net

fees collected which were a result of his own private business. Evidence disclosed that compensation was paid to the appellant from time to time based upon the results and the work performed for the other partner (R. P 100). Assumed business names were filed in the county clerk's office of Multnomah County as required by law and the business to all intents was carried on as a partnership arrangement (R. P 103).

It is admitted that there was no understanding, either written or oral, between the partners as to the sharing of any losses which might be incurred by the firm. Certainly, however, as far as the individual partners were concerned, any losses suffered by the firm or profits made would result in an advantage or disadvantage, as the case might be, to each partner.

It is contended that the relationship after the firm was organized was at least that of a special partnership and that they were entitled to use the firm name and did not violate any of the canons of professional ethics nor mislead or misrepresent to the public their relationship. See *Attorney and Client*, 7 C.J.S. 838, note 19.

What constitutes a partnership is a matter of judicial interpretation. The views of the courts on this question have undergone changes from time to time and rules formerly approved have become obsolete and new tests have been announced as a means of determining whether a particular association constitutes a partner-

ip. Doubtless there are in every partnership unmistakable badges of the relation but no one fact or circumstance can be taken as a conclusive test, nor indeed is it possible to state any number of facts that would in all cases be decisive of a partnership relation. In the best analysis the facts and circumstances of the individual cases must control. Where a person is entitled to share the profits as such in any business enterprise, he is to be considered as a partner as to third persons, even though it is stipulated in the contract that he should not be liable as a partner. 40 *Am. Jur., Partnerships*, P. 146, 153. Moreover it has been held that it is sufficient to constitute a partnership if the partners participate in the profits and are liable to be affected by the losses even though only to a limited extent. It has also been held that where the parties have clearly manifested an intention to form a partnership, the relation is not affected by a provision in the agreement whereby one of the parties undertakes to indemnify the other against any loss or liability incurred or arising out of the business 47 *C.J., Partnerships*, P. 672.

Surely the appellant's conduct was not such as is ordinarily the case where an attorney is complained against for using a fictitious name as a partner or using the name of a person not authorized to practice law. *In re Scott*, supra, *In re Kaffenburgh*, supra. *In re Gluck*, supra. *Thornton, Attorneys at Law*, Vol. 2, p. 252. The evidence adduced at the hearing failed to

show that anyone had been misled, over-reached or prejudiced on account of the appellant's acts, and it is not contended by the complainant that such was the case. See *In re Hertz, supra*. It seems, therefore, that the most that could be said, from the evidence produced is that a doubt has been raised as to the propriety or the right to the use of the firm name and whether or not a special partnership existed. The appellant asserts that since January 1, 1948, a general partnership was formed and all doubt now removed. Surely, under these circumstances the court could not say that the respondent acted wilfully and wrongfully and with guilty knowledge or corrupt motives in the use of the firm name in the conduct of his business. His conduct was not such as would shock the conscience of the court or the other members of the legal profession.

We doubt if the public, the profession, or the courts ever knows whether attorneys, associated together as they commonly do, are working as full partners or under some other arrangement common in the practice of law. It is a common practice for younger members of a firm to share in the profits and yet not appear as a partner in the firm name.

The court might feel that the appellant is taking inconsistent positions in that in referring to the Costello matter he argues that he was not a partner but a mere associate of Milton R. Klepper and therefore not guilty of misconduct when he represented the United States

while at the same time Milton R. Klepper represented Costello; and in now arguing that there was a special partnership after the assumed name certificate was filed and that, thereby he was entitled to use the firm name in the operation of the business carried on by the partnership. The appellant admits that there was no different financial arrangements made between the individuals but calls to the court's attention that the decision to do business under the firm name, while it was concurred in by all of the partners, was a matter for the senior partner to decide (R. P 99). No doubt, Milton Klepper had been associated with the appellant for such period of time and because of the association had come to gain such confidence in the appellant, that he was willing to hold him out as a partner. Surely, as to third parties they were partners and would have been liable as such, in the discharge of their duties as attorneys.

CONCLUSION

The bar of the State of Oregon is an integrated bar and was so created by the state legislature. *Tit. 47, Attorneys, Chapter 2*, 47-201-226 O.C.L.A. 1940 Ed. Provisions have been made for the creation of local committees to investigate and conduct hearings for acts of alleged misconduct against members of the bar. 47-216-219 O.C.L.A. 1940 Ed. The Board of Governors may make recommendations to the Supreme Court of the State of Oregon and the Supreme Court may affirm,

modify or reverse the recommendation. 47-213 *O.C.L.A.*, 1940 *Ed.* This proceeding did not conform with the procedure as established by the Oregon State Bar Association.

Where an attorney has been disbarred by the Oregon Supreme Court, the United States District Court for the District of Oregon has provided by rule that within thirty days the disbarred attorney must show cause why he should not also be disbarred from practice in the United States District Court. See appendix P. *51*.

The United States District Court for the District of Oregon has appointed its own permanent standing committee on Discipline. This committee is not in any manner connected with the Oregon State Bar. It is appointed by the Judges of the United States District Court for the District of Oregon. The membership of the committee is composed of five lawyers. One of its members took no part in these proceedings.

It is never a pleasant task for a lawyer to come in conflict with the courts. This conflict is particularly pointed under the disciplinary procedure as adopted in the District Court of the United States for the District of Oregon. In disbarment proceedings under the state law the committee is appointed by the Board of Governors. Appointment of the committee by the court, then the court to sit as "tryers of the fact", does not conform to the usual standards which obtain in all

states which have now adopted what is commonly termed "the integrated bar."

In the *Hughes vs. Alaska Steamship Co.* matter and in the *United States vs. Eugene Russell Costello* matter the entire proceedings occurred before Judge McColloch. It is not contended that the court by the slightest intimation made it known to Patterson that he felt that there was any question of propriety. That he had knowledge of Klepper and Patterson's relationship is beyond question (Ex. 6, 7, 8, 9, 10, 11, 12.)

The Court was not satisfied with its own committee's findings and directed that they be strengthened, (R. P 178, 179, 182). Later the court decided to prepare its own findings and thereupon did so. (R. P 197).

The Court's opinion was not originally made a part of the record although we designated that it should be (R. P 35, 39). The designation was filed on January 27, 1949 (R. P 35). After the appeal was taken and, towit, on March 10, 1949, the opinion was filed and transmitted by the District Court clerk to this court whereupon it was filed and made a part of the record on March 12, 1949, (R. P 218). We recognize that the opinion on its face is very damaging to the appellant. It is contended strenuously, however, that many statements made by the court are unfounded and without any support in the record. It is said by the court that four incidents prove the indictment. (R. P 210).

First: Patterson defended a person charged with murder in the state court. Our answer is that the Attorney General's regulation does not prohibit this, but merely directs that it *should not* be done. It is not contended that the Attorney General could not give his permission under certain circumstances or that he would not have done so in this instance. Apparently from the record the Attorney General thought that permission should be granted in this instance as no action was taken by the Attorney General against the appellant. (R. P 80).

Second: Patterson, while Assistant United States Attorney, represented Hughes in an action against a private corporation towit, the Alaska Steamship Co. It is said he knew that his client, the United States would be morally and in certain events legally liable to pay any judgment which might be recovered (R. P 210). This statement is not only unsupported in the record but it is clearly shown private insurance carriers defended the action (R. P 84).

Third: Patterson attempted to charge a Parolee a fee for obtaining money on deposit in the registry of the court at San Francisco. (R. P 211). It is suggested that Patterson intended by his action to prey upon this ward (R. P 212). The record discloses that Patterson gave him the advice any other Assistant United States Attorney would have given him, (R. P 152) with the exception that when the ward still seemed dissatisfied,

Patterson did advise him he would be glad to see what he could do for him if he did not secure satisfaction elsewhere. Is an attorney to be punished and disbarred for acting in good faith in trying to assist a party? Apparently the court contends that Patterson should have told Martin that he could do nothing for him and to seek advice elsewhere. It is abundantly plain, that Patterson had no responsibility or authority as an Assistant United States Attorney in the U. S. District Court in California.

Fourth: Patterson appeared for the Government in the case of *United States vs. Eugene R. Costello* while at the same time his associate, Milton R. Klepper appeared for the defendant. It is suggested that Costello was deceived into entering a plea of guilty upon the promise of a light or a suspended sentence. (R. P 215). While this is the only charge against the appellant which we believe subjects him to criticism, nevertheless, the statement of the court could not be further from the facts as disclosed by the record. Costello did not testify at the appellants hearing. It is not contended by anyone however, that Costello was deceived into entering a plea of guilty or that he had not long before the hearing made up his mind to enter a plea of guilty. His aunt merely desired an attorney to make a statement in his behalf. Although it was known to the Judge of the association of Patterson and Klepper, apparently he did not consider it too grave a matter, as nothing was said

to Patterson or to Klepper by the Court either at the time of plea or the time of sentence held one month later. (Ex. 3, 4).

The opinion intimates that counsel for Patterson at the trial and one of the writers of this brief was at least "over-persuaded" in accepting the defense of J. Robert Patterson. We gather the implication from the opinion that no lawyer should have accepted employment in behalf of Patterson. May we say to this court we were not "over-persuaded"—we were not "prevailed upon." We accepted the employment only after due and complete deliberation and investigation as to the law and as to the facts.

The truth is that after the alleged charges of misconduct had been fully discussed with counsel; counsel was of the opinion that they contained no merit. Counsel is even more convinced of this same fact today and feels that a rank injustice has been done against not only the appellant but the profession as a whole. This court is aware that it has taken years of experience for the average young lawyer to be well rounded in ethics, practice and procedure. Normally, the young lawyer has the benefit of criticism and advice, both from the Courts and from older attorneys. Counsel doubts that the record of any young lawyer would reveal fewer mistakes of judgment, and most of these cannot even be called mistakes of judgment. It is contrary to every primary principle of justice that *suspicion* should be

read into them for the purpose of imposing such a severe penalty.

Lastly, it is contended that he has failed to guard the interests of the defenseless and oppressed (R. P 217). We believe, that if anything, the record clearly demonstrates that Patterson (perhaps because of his age) was too anxious and eager to assist others and to do everything in his power to help them.

We recognize that the opinion of Judge Fee is most severe. The use of the words "traitor" (R. P 218)—"Moral Myopia" (R. P 209), are very harsh. We deem that these words might be appropriate if infamous or heinous crimes had been committed. As we have read and re-read the record—read and re-read the opinion—we are unable to see the justification for such severity and harshness.

When the court speaks of "Moral myopia" and "attacks from traitors" (R. P 177, 209, 218) it merely indicates, to us at least, that there was prejudice prior to "*weighing the evidence*".

We quote :

"The Court (Fee, J.): I just want to make plain my personal attitude. I will personally never hear another matter in which Mr. Patterson appears, because I am prejudiced against him, I am prejudiced on this record." (R P 199, 200).
* * * because the matters of record are so preju-

dicial to Patterson that the writer would be unable to have confidence in any representations or contentions made by him (R. P 217).

The question is raised that did not thereby the judge disqualify himself from proceeding further after he had become convinced that he was prejudiced against Patterson, and is not therefore the judgment void? We are convinced that the penalty imposed could not have been entered in "judicial calm".

It is unfortunate that because of the confidence placed in him by his superiors that it became his duty to handle many cases which were strenuously contested. He appeared in 90% of all the OPA civil litigation and in all of their criminal cases. It was necessary to seek reversals of the court's ruling in certain instances. *U. S. vs. Sagner, et al*, 71 F. supp 52, Reversed 331 U. S. 791, 67 S. Ct. 1522, 91 L. Ed. *U. S. vs. Oregon City Woolen Mills* 162 F. (2d) 721.

He was attorney for the United States in a case brought against a device known as Specto-Chrome which resulted in an appeal to this court. *U. S. vs. Olson*, 161 F (2d) 669.

He represented the Government in a proceeding brought pursuant to *Rule 20* of the *Federal Rule of Criminal Procedure*, 18 U. S. C. A. foll. Sect. 687. The District Court refused to recognize this rule *U. S. vs. Schwindt* 74 F. Supp. 618, *U. S. vs. Bink* 74 F. Supp.

603. Handling of these cases by the appellant clearly indicate the confidence placed in Patterson by his superiors.

It is not contended, nor does the appellant himself, contend that all of his acts were done with the best of judgment. It is strenuously contended, however that at no time did he act with guilty knowledge or with corrupt motive. It cannot be pointed out in a single instance, where the appellant sought to deceive anyone or that anyone was misled or damaged by his actions. Had he consulted with older and more experienced lawyers, possibly, the acts complained of would never have occurred. While it is realized that cases such as these must ultimately depend on the individual facts of each case, nevertheless in our experience, an attorney has never been disbarred and deprived of his livelihood merely because of a mistake of judgment. If this is to be the standard that all must adhere to, then few of us can feel secure.

An apt quotation from the case of *People vs. Lotterman*, 353 Ill. 399, 187 N.E. 424, 428, is deemed appropriate.

“It is the duty of the court to protect the public against the wrongful acts of unscrupulous and dishonest lawyers. However, the court also has a duty to its attorneys, who, though they have made a mistake in their professional conduct, have not done so through any base, sordid or dishonest motives.”

Measuring the conduct of the appellant by the standards which were referred to at the beginning of this brief, we submit;

J. Robert Patterson is not guilty of misconduct so as to be unworthy of the trust and confidence involved in his official oath, nor is he to be found wanting in integrity, moral character or personal honesty.

The evidence is not conflicting but overwhelming to the effect that he acted throughout in the utmost good faith and without any intent to cheat, harm or defraud.

Not one of the acts complained of have resulted in harm of the slightest nature to anyone.

A mistake of judgment in certain instances, *perhaps*, but not such a mistake as would shock the conscience of the court, his fellow lawyers or the public.

It is contended that a careful analysis of all the evidence leads to only one conclusion: that the appellant did not, either in heart or mind, act with bad faith or with corrupt motives and that the findings and judgment of disbarment are not supported by the evidence and should therefore be reversed.

Respectfully submitted,

B. A. GREEN,
MASON DILLARD,
Attorneys for Appellant.

APPENDIX**RULE I****ADMISSION TO THE BAR (UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF
OREGON)**

Whenever as a result of proceedings had in the Supreme Court of the State of Oregon any attorney of this court is suspended or disbarred from practice as an attorney before the Supreme Court or other courts of the State of Oregon, the Standing Committee on Discipline to the Bar of this court shall investigate the charges against such attorney, who shall within thirty days after the order is entered by the Supreme Court of the State of Oregon, show cause to said committee why he should not be suspended or disbarred from practice in this court. Said committee, with or without cause shown by said attorney, shall make its report to this court with its recommendation of the action to be taken by this Court.

In the United States
COURT OF APPEALS
for the Ninth Circuit

IN RE J. ROBERT PATTERSON,
Appellant.

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the United States District
Court for the District of Oregon.

HON. JAMES ALGER FEE,
HON. CLAUDE MCCOLLOCH,
Judges.

B. A. GREEN,
MASON DILLARD,
Attorneys for Appellant.

JAMES C. DEZENDORF,
Representing the Standing Committee on Discipline.

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HON. JAMES ALGER FEE,
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Judges.

FOREWORD

An attempt will be made to answer the serious charges that the Committee has made against the Appellant in their brief. Significantly, much of the statement is devoted to stating general principles of law, with which we do not seriously disagree.

Respondent states that the facts are largely undisputed and are authoritatively stated in the findings (R. B. P. 1). The first portion of the statement is true.

The facts are not disputed because the appellant has been honest and "above-board" throughout the tortious course of these disciplinary proceedings. The second portion of the statement which refers to the findings overlooks the fact that this appeal is based upon the proposition that the evidence is insufficient to support the findings and judgment.

It is submitted that the committee has made no attempt, either in the statement of facts or elsewhere, to subject the evidence to careful analysis, free from suspicion, in support of the contention that the appellant has been guilty of such gross professional misconduct that he should forever be disbarred.

In the final analysis each case of necessity must be decided upon its own particular facts. It is equally true that the object of a proceeding of this character is not to punish the appellant but to protect the integrity of the courts, the public, and the honor and good name of the profession. If the appellant has been guilty of misconduct involving what is commonly called "moral turpitude" we cannot seriously disagree that he should not be disbarred. Herein lies the "crux" of this whole proceeding. It is not contended that the appellant has violated any law or been dishonest. If he is to be disbarred, it must be on the ground that his conduct shocks all our known conceptions of the duty of a lawyer to the court, to the profession and to the public. It does little good to state general principles or broad statements such as are contained in the Committee's brief unless the same are supported by a reasonable interpretation

of the facts. Perhaps as the committee suggests, we are blind to the appellant's dereliction. However, we will endeavor to point out in this Reply brief how untenable the position of the Committee is and why a careful analysis of the evidence does not support a conclusion that he is unscrupulous, untrustworthy, "a traitor" and afflicted with a "moral myopia".

We believe that the trial court has unconsciously embarked on an exploratory excursion into the field of morals. This is not primarily a judicial function and all too frequently results in an unwarranted extension of the definition of "moral turpitude". We believe that the court has, also, unconsciously perhaps, mistaken its own bias for an intuitive perception of the common conscience.

Show us a lawyer with a bad heart, a bad mind, a person without conscience if you will, and we will show you a person who is not entitled to practice law. On the other hand, can you show us a young lawyer just beginning his practice who has not made mistakes of judgment? Contrary to the impression that the committee seeks to leave with this court that the appellant's attitude is wrong (R. B. P. 22), the appellant admits that some of his acts had the appearance of impropriety and should never be duplicated in the future. But never did the appellant act through improper motives or with that baseness of conscience that must characterize an act justifying permanent disbarment.

Therefore, our problem, here, is the application of well recognized rules of law to the specific facts of this record.

FIRST PROPOSITION: ACTS JUSTIFYING DISBARMENT

It is submitted that the judgment of the trial court must stand or fall upon the question whether the appellant's acts involved moral turpitude. Bouvier's Law Dictionary defines "moral turpitude":

"An act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow man or to society in general, contrary to the accepted and customary rules of right and duty between man and man."

To attempt to set forth cold principles of law and to attempt to draw analogies from other cases will not suffice. The courts from the earliest days have attempted to set forth acts justifying disbarment. See notes set forth following cases in 13 Fed. 820, 8 Pac. 52, 2 At. 214. The Committee does not contend that the appellant's conduct approaches any of these known rules of unethical conduct.

Reference is made by the committee to the case of *ex parte Finn*, 32 Or. 519. With the language of Justice Bean we agree but the facts in the cases are materially different. In the Finn case the attorney filed purported sworn affidavits in the Supreme Court for the purpose of affecting litigation therein pending. In fact the affidavits were never sworn to before Finn although he affixed his notarial seal. The attorney was suspended for one year. Perhaps we are not the "discerning person" suggested by the committee (R. B. P. 3) but we fail to see the application of the principles therein enun-

ciated to the instant case unless suspicion is to be read into each of the appellant's acts.

It is next suggested that the protection of the public and the integrity of the courts require appellant's disbarment (R. B. P. 2). Nowhere can it be shown, nor, indeed, is any attempt made by the committee to do so, that the appellant sought to mislead a client or the court. Has he been dishonest? Has he sought to deceive? Has anything been shown to indicate his intentions and motives were bad? It has not and cannot be so shown, not in one single instance.

We take it as agreed that each proceeding of this nature must rest upon its own particular facts. We have been unable after diligent search to find any decision, State or Federal, where the facts even remotely correlate with those here and any penalty approaching permanent disbarment has been imposed.

In our statement of points to be relied upon in this appeal (R. P. 206) it was contended that the evidence was insufficient to support or justify the findings and judgment entered by the District Court. Of course necessarily included in this statement, is the question, among others, whether the Trial Court abused its discretion in entering such findings and judgment of *permanent disbarment*. This is true because if the evidence is not sufficient to justify such findings and judgment, it necessarily follows that the court abused its discretion in so entering them.

SECOND PROPOSITION: MARVIN L. HUGHES v. ALASKA STEAMSHIP CO.

Respondent has set forth certain rules of Professional Conduct both in Appendix A and in their brief. We do not disagree with the principles set forth therein. They, however, are not pertinent, except to a limited extent, to the facts in issue.

It is pointed out that the appellant failed to advise Hughes of his rights and to consult other counsel until after these disciplinary proceedings had been commenced (R. B. P. 1). The evidence conclusively shows that this was the first time any possible impropriety of his actions was called to his attention. It indicates to us that the appellant always had the interests of Hughes in mind and also did not intentionally perform any act of unprofessional conduct.

It is suggested by innuendo that the appellant represented Hughes through his desire for personal gain. The committee frankly admits there is no evidence or means of ascertaining this fact (R. B. P. 5). If this be true, better it be left unsaid than to attempt to prejudice the appellant before this Court by such a method.

It is next pointed out that since appellant felt he was protecting interests of the United States in representing Hughes he was thereby willing to sacrifice Hughes' interests in favor of his primary duty to the United States (R. B. P. 6). On the face of it, the committee has suggested an imposing argument. However, as will be later pointed out, the appellant thought he

was protecting the interests of the United States in not subjecting it to a suit that he felt in good conscience was unfounded. That is what the appellant's intentions were and not that he was sacrificing Hughes' interests.

Hughes was traveling on a peculiar ticket at the time of his injury as is disclosed in Exhibit 2. The provisions of his War Shipping Ticket as in the case of *Arnestal v. U. S., et al.*, 1946 A.M.C. 1364, limited his right to recover in tort for any injuries he received. In similar cases instituted by seamen, private insurance carriers were defending the action. No decisions of courts were available at that time to indicate Hughes' possible rights. Can it seriously be contended that the appellant acted in bad faith and with wrongful motive in honestly believing and contending that Hughes' action, if any, should be asserted against the Alaska S. S. Co. The appellant did not sue the U. S. and no apparent conflict of interests appeared.

We readily agree as respondent states that if the appellant's conduct was wrongful at the time, subsequent decisions could not make it proper (R. B. P. 6). However, we point this out to indicate the good faith and absence of improper motives of the appellant. In the *Arnestal* case, *supra*, the court confirmed the appellant's actions in believing that Hughes had no claim against the United States.

Respondent suggests that there was a possibility that if Hughes recovered from the Alaska S. S. Co. that the United States might be required to indemnify the defendant (R. B. P. 5). We do not believe that the

construction of the General Agency Contract, even if mistakenly made, should be made the basis of permanent disbarment. In fact no court has ever so construed the General Agency Contract.

It is true, as Respondent states, that an attorney has no right to pursue an unethical course of conduct until cautioned against it (R. B. P. 5). It is equally true that it might be expected that if some serious misconduct occurs before a court where the attorney is just beginning his practice of law, that some mention would be made of the misconduct by the court to the young and inexperienced member of the bar. Especially is this true where it is contended that the misconduct was so flagrant as to warrant permanent disbarment. Where the lawyer complained of is a long experienced practitioner, technical charges might suffice but not against a young and inexperienced person. We urge that intentional wrongdoing and personal dishonesty must be clearly demonstrated in these instances.

An unbiased review of the evidence free from suspicion leads to the conclusion that the appellant did not dishonestly represent Hughes. We submit there is a total lack of proof to so much as suggest that his acts involved moral turpitude and fails utterly to demonstrate his moral unfitness to practice law.

**THIRD PROPOSITION: STATE OF OREGON
v. JAMES WESTLEY BOWDEN**

Respondent in its supplemental statement of facts state that the appellant actively participated in the trial by sitting at the counsel table and cross-examining "*the witness*" (R. B. P. 1). It is then charged that his participation was thereby substantial rather than nominal (R. B. P. 8). To read the committee's brief one would be led to believe that there was only one witness. The fact is that the trial consumed five full days and nineteen witnesses testified. The cross examination of this witness by appellant lasted not to exceed three or four minutes, was brief, and was with respect to a collateral matter. With this minor exception, the cross examination of this witness, as was true of all other witnesses who testified, was conducted throughout by the attorney who was actively trying the case. It is submitted that if the appellant's participation in the case was not nominal, no meaning can be given to the word.

Respondent's statement that the appellant anticipated that he might be called as a witness at the time he accepted employment is not borne out by their reference to the record (R. P. 111). After Mr. Hicks began preparing the defense it was anticipated that there was such a remote possibility but in fact he never was such a witness (R. P. 111, 112, 123, 124). We urge that the opinions submitted by respondent in Appendix B relative to this phase of the case are without application where the attorney does not actually become a witness.

It is next suggested that the fact he was an Assistant U. S. Attorney tended to impress the jury on behalf of the defendant (R. B. P. 8). The record conclusively establishes that the jury was never informed of appellant's status as Assistant U. S. Attorney (R. P. 88, 110).

The charge is made that the appellant acted throughout with improper motives and through his desire for pecuniary gain (R. B. P. 8). No facts are set forth to support this broad and unwarranted charge. The portion of the fee accepted by the appellant was twenty-five per cent. Regardless of whether the Oregon State Bar has specifically approved or sanctioned this fee arrangement (R. B. P. 1), it will not be denied that it is an established custom among the Oregon Bar to collect one-third of the fee where business is given to another attorney on a referral basis. We only point this out to indicate it was not pecuniary gain that was the motivating factor in the appellant's representation of Bowden. As alleged in the appellant's answer, had it been necessary to do so he would have resigned as Assistant U. S. Attorney in order to assist his friend and former client in his hour of extreme need (R. P. 11).

Respondent suggests now that the appellant could not properly appear as a defender in another forum under any circumstances (R. P. 8). The court indicated that had the appellant obtained "*clearance*" from the Attorney General it would have been proper (R. P. 119, 120, 121, 122, 131). The Attorney General's manual directing that this practice should not occur is an inter-departmental ruling which of course could be waived

under certain circumstances. The Attorney General must have felt that the circumstances here would have justified the granting of "clearance" as no action was taken against the appellant by the Attorney General (R. P. 80).

The appellant as Assistant U. S. Attorney was under no circumstances charged with the prosecution of Bowden. There was no conflict of interests. A former Assistant U. S. Attorney was in charge of Bowden's defense (R. P. 112). The District Attorney for the State was fully informed of the appellant's position and no objection was made or intimated (R. P. 110). The U. S. Attorney knew of the appellant's participation in the trial and did not prohibit it (R. P. 120). No word was spoken to the appellant indicating the slightest impropriety of his contemplated action. Did the appellant's action, therefore, indicate a "moral myopia" in his minimal representation of Bowden?

We do not contend that a prosecutor should make it a practice of defending persons charged with a crime in another forum. As a general rule we believe this principle to be sound. However, under certain circumstances, it might be proper, when no possible conflict of interests exist. Certainly it cannot be said the appellant's action involved moral turpitude under the circumstances disclosed.

FOURTH PROPOSITION: JOSEPH MARTIN MATTER

The opinions of the American Bar Association set forth in Appendix C of respondent's brief have no bearing upon the issues involved in this charge. As pointed out in our opening brief, Martin was not a member of the Military, Naval or Marine forces of the United States (A. O. B. P. 29).

Once again the committee has suggested that the appellant's motive was financial gain (R. B. P. 9). Even the testimony of Martin, a convicted criminal and a person dissatisfied because the appellant would not perform a gratuitous service, which he was unable to do, does not sustain the committee's position.

We quote:

"Q. (Mr. Dezendorf) Was anything said about the amount that would be required in attorney's fees to accomplish this?

A. He said approximately a hundred and seventy-five. There was no set price." (R. P. 65)

Cross examination by Mr. Green:

"Q. Now, the question with respect to a fee or whatever charge was made, isn't it a fact that what you asked Mr. Patterson was what he thought a lawyer would charge you? Isn't that what you asked him?

A. Approximately how much it would cost to get it.

Q. Yes; and he said that in his opinion it would probably cost about \$175, is that right?

A. Well, I was more or less asking him on his

part how much it would cost.

Q. Just answer my question, please. Isn't it a fact that that is what you asked him and that is what he told you?

A. That is what he told me.

Q. Yes. A. Yes.

Q. And that is what you were trying to find out, what your approximate cost would be?

A. Yes." (R. P. 68)

Mr. Twining, Chief Deputy U. S. Attorney, had this to say regarding such a contention:

"The Court (Fee, J.): Yes. In other words, you act on ethical principles.

A. Well, let's say again, in honesty, your Honor, if that is an indication that I think that his conduct was unethical in that case, I think that he was misled, and I don't understand from the facts in this case, I don't understand and haven't since the outset of this case, that Patterson offered to do this for a fee. I don't believe that, and I never thought that. I thought that he was using the thing as an example when it came to that phase. I may be wrong, but I know Patterson was very badly crowded and worked too fast, he was impulsive. I was worried about it. He took off down the alley in a hurry lots of times, and, therefore, when I talked to him first about this thing I got the impression, I thought that Patterson was saying to this fellow, 'This is what I would have to do.' I don't think he ever dreamed that the man would come back. I think he did everything he could to kick him out. In short, if I make myself clear, I have had people in there many times, some of them are hard to make understand, like in these veterans' situations, we would have to represent them here—I can't do it, when they come in from another state, I can't tell them what we would have to do. I would say, 'I would have to charge you three hundred dollars', never intending to do it." (R. P. 154, 155).

Under all the evidence and *with the approval of the Court*, the United States Attorney's office in the District of Oregon had as a matter of regular practice represented such persons in the District of Oregon (R. B. 155, 156, 157). The committee cannot now urge that this appellant should have told Martin that he could not help him because his claim was against the United States (R. B. P. 9).

Respondent then urges that Patterson should have said, "You are a ward of the Court and it is my duty to help you as much as I can free of charge." (R. B. P. 9). What does respondent contend Patterson should have done for Martin that he didn't do? The appellant gave Martin the advice he sought with no attempt to deceive. Only when Martin hesitated did Patterson even suggest that he might possibly be able to help him in his private capacity. Many times an attorney is met on the street by a friend and the friend engages the attorney in conversation regarding a legal matter. It is natural for the attorney to say, "Come up to the office sometime and I'll see what can be done." This does not mean the attorney will represent the friend; it may be that after the matter is fully discussed no action would be taken or the matter might be referred to someone else. Indeed in this very instance, as the record shows without controversy, appellant advised Martin to procure the services of his brother's attorney (R. P. 69, 91). Surely a fair consideration of all the facts leads to a conclusion that the appellant did honestly and without corrupt motive advise Martin in absolute good faith.

This is the charge that Judge McColloch says "impressed him the most" (R. P. 218). This is the same charge upon which Judge Fee lays such stress in his opinion (R. P. 211-213). This is the charge that the respondent *now* states constituted a serious breach of his duty toward both Martin, as a ward of the court, and the United States (R. B. P. 10). In the committee's original findings based upon the complete record, they had this to say:

"IN RE J. ROBERT PATTERSON

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

* * * * *

IV.

Joseph Martin Matter.

That Joseph Martin was referred to Mr. Patterson in his capacity as Assistant U. S. Attorney in connection with Martin's desire to procure the release of certain funds deposited in the registry of the United States District Court at San Francisco; that Mr. Patterson advised Mr. Martin as to the method of procuring the release of the funds involved and invited Mr. Martin to consult him at his private office in the Yeon Building, and that Mr. Patterson advised Mr. Martin that the estimated fee for handling the matter was \$175.00.

* * * * *

II.

That J. Robert Patterson was not guilty of unprofessional conduct in connection with his handling of the Joseph Martin matter.

A true copy

J. C. DEZENDORF"

Respondent suggests that by reason of his position, the appellant could have taken advantage of Martin even to the extent of securing a revocation of his parole. This to us is a highly remote and speculative conclusion unwarranted by any fact or circumstance appearing in this record. It is to be said to his everlasting credit that no such thing occurred. He took no advantage of anyone, including Martin.

If it can be said that the handing of the business card was a solicitation of business, which was not the circumstance here, as we contend, it must be conceded that it was done in a most honorable fashion. If this is to be condemned then the rich lawyer's private club, golf course, beach home and mountain retreat would be a more practicable starting point.

We submit that as far as this charge is concerned not the slightest moral turpitude can be attached to the appellant's actions.

FIFTH PROPOSITION: UNITED STATES v. COSTELLO

The facts are not in dispute as to the status that existed between Klepper and Patterson at the time of the Costello hearing. After considering all the argumentative material submitted by the respondent, we concede that the appellant made a mistake of judgment in connection with the handling of the Costello matter. The appellant and his counsel agree that it should never be duplicated in the future. While no advantage was

taken of the Court, the accused, or the United States, nevertheless, an appearance of impropriety can be urged even where mere office associates appear on opposite sides of litigation. The facts become doubly important and should be closely scrutinized to see if there is any indication that the appellant acted with improper motives so that his acts can be said to involve moral turpitude.

Before appellant entered the United States Attorney's office he was paid a salary by Klepper, and Klepper, for services rendered appellant, was given one-half of all fees collected by appellant. After appellant entered the United States Attorney's office, no salary was paid appellant by Klepper. Appellant still paid Klepper one-half of his fees for the space he occupied and for telephone, stenographic service, etc. On October 2, 1946, some ten months after the Costello hearing, the parties began doing business under the firm name of Klepper, Brown & Patterson.

Apparently the Standing Committee has abandoned the later charge against the appellant that he was guilty of unprofessional conduct in representing that he was, and in holding himself out as a partner in the firm of Klepper, Brown & Patterson, when in fact no partnership existed. No mention or argument is contained in the respondent's brief on this subject, with the exception of setting forth opinions of the American Bar Association. Since the respondent now states that appellant was a partner all of the time, even before the assumed name certificate was filed, we can only conclude that

the later charge has been abandoned. This merely indicates, to us at least, that respondent is no more sure today of its position than it was at the time the charges were filed.

The appellant paid Klepper for the space and other services furnished by Klepper. There was no attempt at the time of the Costello hearing to hold the other out as a partner. Appellant had no interest in Klepper's practice. The most that can be said is that they were office associates.

It is not contended that Costello was deceived or promised anything in order to get him to enter a plea of guilty. This was his intention at all times. There was no contest such as you have where a plea of "not guilty" is entered by a defendant. The sentence was imposed only after full disclosure of the facts by both the appellant and the Probation Office. The statement made by the committee that defense counsel was wielding economic power over the prosecutor (R. B. P. 13), in fact is untrue. Klepper was paid for all services rendered by Klepper to appellant. Appellant did not share in the fee charged Costello by Klepper (R. P. 94).

Some attempt has been made by respondent in its brief to qualify the holdings of the authorities cited by us in our opening brief (R. B. P. 10-14). We cannot agree that such attempt has been successful. The authorities are agreed that where there is no improper motive or adverse interest, it is not improper for office associates to appear on opposite sides of litigation. We do not intend to imply that such conduct should be

looked upon with favor. We do believe that such practice should be discouraged. However, where a young and inexperienced member of the bar does so act, then it is not ground for permanent disbarment. This is especially so where no improper motive or baseness of conscience is made to appear.

Respondent suggests that our opening brief concedes that a partnership existed between Klepper and Patterson at the time of the Costello hearing (R. B. P. 14-15). This is by no means a true statement. The parties never agreed to associate as partners until the assumed name certificate was filed. No attempt was made to hold the other out as a partner until such time. It is elementary that the intentions of the parties is a strong factor in determining the relationship existing between them at any particular time.

An attempt is made to imply bad faith on the part of counsel and an attempt to mislead this Court (R. B. P. 17). In the findings prepared and entered by the Court, a statement is made "that the Court was not aware of the relationship between Patterson and Klepper and between Patterson, Klepper and Brown, until the same was brought to the attention of the Court by the complaint in this proceeding" (R. P. 23). It is true that an additional statement is also made in reference to the Costello matter "that at the time of these occurrences the Court was unaware of the relationship between Patterson and Klepper and Patterson failed to disclose the relationship to the Court" (R. P. 26-27). It seems to us that the exhibits No. 6, 7, 8, 9, 10, 11, 12

tend to prove that there is no basis for the first statement. While it is true that all of the matters disclosed by the exhibits occurred subsequent to the Costello hearing, nevertheless, certain preliminary matters occurred in the Hughes case prior to this time, Judge McCulloch on December 10th ordered the case set for trial. Deposition of witnesses had been taken. It is not unlikely to infer that the Court had some impression that a relationship existed between Klepper and Patterson at the time of the Costello hearing.

We submit that since respondent is now of the opinion that the evidence strongly indicates a partnership to have existed between Klepper and Patterson for some long period of time and the appellant was daily before the Court as an Assistant U. S. Attorney, some intimation of a relationship between them should have occurred to the Court.

It is admitted by counsel and by the appellant that his conduct might subject him to criticism. Where the facts are as disclosed, no attempt was made to deceive the Court, Costello or anyone; a mistake, yes, but not one of conscience, heart or mind.

SIXTH PROPOSITION: DOING BUSINESS UNDER THE FIRM NAME

As previously stated, apparently respondent has now become convinced that there is no merit to this charge of unprofessional conduct as it is not argued in respondent's brief. Respondent has attached Appendix E. con-

taining opinions of the American Bar Association relative to this charge. It is now contended by respondent that the appellant was a partner at all times. It is significant that after the committee had found the appellant not guilty of unprofessional conduct in the Martin matter that it should now change its position in accordance with the opinion of the Court. The same is true here, respondent originally charged that the appellant *never was a partner of Klepper* and after the opinion of the Court states *he always was a partner*. It has always been our contention that the committee in proceedings of this nature acts in the same capacity as counsel *amicus curae*. Here, however, we find the committee echoing the opinion of the Court.

In any event it is submitted there is a total failure of proof that the appellant acted with that "moral myopia" as far as this charge is concerned. There is not the slightest indication that there was a lack of moral conscience on the part of the appellant.

CONCLUSION

The statements made by respondent in their conclusion relative to the appellant's loyalty to his clients are, in our opinion, without support in the record (R. B. P. 17-18). The general principles relative to the duty of a lawyer to his client are correct and with which we agree. Our contention relative to each charge has been fully discussed in this and our opening brief. There is not the slightest suggestion that the appellant in bad con-

science or with unscrupulous motives did any act which tended to injure his clients or anyone.

Respondent has misconstrued our argument if they believe that we have taken a position that this matter should have first been referred to the Oregon State Bar Association or that the procedure was improper. We merely pointed out the difference in the procedure adopted by the District Court of Oregon and the integrated bar. This is not the first time that anyone has advocated a uniform system for admission and disbarment in the Federal Courts. See articles entitled: The Federal Bar: A Decentralized System of Admission and Disbarment, 20 Am. B. Assoc. Journal 762.

In the final analysis the judgment against the appellant must stand or fall upon construction of the trial court's words "moral myopia". The court has painted the young man as an unscrupulous, dishonest and immoral person, one who is not to be trusted with the practice of one of the most honored of professions. We have been unable to justify the court's Opinion, Findings and Judgment. A young man embarking on his career should not be deprived of his long awaited goal unless it can be said the evidence is clear, free from doubt, and overwhelming to the effect that he cannot be so trusted. Appellant made mistakes, yes, as do we all, but even reading suspicion into these mistakes, we cannot conceive of a Court finding on this record that they involved moral turpitude or justified the use of the word "traitor".

It is finally contended that the appellant's attitude is still one of moral blindness (R. B. P. 22). No basis for this conclusion is disclosed. Appellant's counsel have been very close to the appellant and his family since the initiation of these proceedings. His attitude is not one of defiance or personal justification of his acts. He has admitted from the outset that mistakes were made. He realizes that one who practices law must be ever ready to carefully consider his actions before taking them. We believe the committee is unwarranted both as a matter of principle and as a matter of fact from seizing upon the appellant's attitude to justify the judgment of permanent disbarment.

It was our contention to begin with, as it is now our contention, that unprofessional conduct cannot be sustained in the findings from the evidence. It is believed that a clear abuse of discretion is indicated by the trial court's findings and judgment based on the evidence adduced.

In *Bartos vs. U. S. D. C. for Dist. of Nebraska*, 19 F. (2d) 722, a lawyer was suspended for three years for the manufacture of beer in his home in violation of the eighteenth amendment. On appeal the court said:

"This circumstance mitigates the offense and it seems to me robs it of any such turpitude as would justify the severe punishment of a suspension from practice for a period of three years. The violation of his oath of office as an attorney was a technical one for which a reprimand of the Court would have been sufficient punishment. The severe punishment administered under all the circumstances was in my judgment an abuse of the discretion imposed in the

Court, and for that reason I concur in the conclusion that the order of disbarment should be set aside."

We respectfully urge that the judgment should be reversed and the order of permanent disbarment set aside.

Respectfully submitted,

B. A. GREEN,

MASON DILLARD,

Attorneys for Appellant.

No. 12181

United States
Court of Appeals
for the Ninth Circuit

TIGHE E. WOODS, Housing Expediter, Office of
the Housing Expediter,

Appellant,

vs.

H. M. GOCHNOUR and MRS. H. M. GOCH-
NOUR, His Wife,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the Eastern District of Washington,
Northern Division

FILED

MAR 28 1949

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

CLINTON J. CRANDALL,

ROY C. FOX,

905½ Third Avenue,
Seattle 4, Washington,

Attorneys for Plaintiff and Appellant.

FRANK P. WEAVER,

204 Columbia Building,
Spokane 8, Washington,

Attorney for Defendants and Appellees.

In the District Court of the United States
for the Eastern District of Washington,
Northern Division

No. 755

TIGHE E. WOODS, Housing Expediter, Office of
the Housing Expediter,

Plaintiff,

vs.

H. M. GOCHNOUR and MRS. H. M. GOCH-
NOUR, His Wife,

Defendants.

COMPLAINT FOR INJUNCTION AND
RESTITUTION

Comes Now the plaintiff above named and alleges
as follows:

FOR ITS FIRST CAUSE OF ACTION

I.

That the plaintiff is the duly qualified Housing Expediter, Office of the Housing Expediter, an agency of the United States Government created by the Veterans' Emergency Housing Act of 1946 as amended, (50 U.S.C.A. App. Sec. 1821 et seq.) and brings this action pursuant to Executive Order 9841 (12 F.R. 2645), Executive Order 9809 (11 F.R. 14,281) and the Emergency Price Control Act of 1942 as amended (50 U.S.C.A. App. Secs. 910-946), said Emergency Price Control Act heretofore being referred to as the Act.

II.

Jurisdiction of this action is conferred upon this Court by Section 205(a), Section 205(c), and Section 205(e) of the Act, as amended.

III.

That the defendants, H. M. Gochmour and Mrs. H. M. Gochmour, husband and wife, at all times herein mentioned were the landlords of certain housing accommodations consisting of one 2-story dwelling house and 6 frame houses, all situated in Route 4, Pierce Street, in the City of Wenatchee, Washington, and within the Wenatchee Defense Rental Area.

IV.

That in the judgment of the expediter, defendants have violated the provisions of the Emergency Price Control Act and regulations issued pursuant thereto, in that defendants demanded, collected and received from one Keith Van Etten, the tenant occupying House No. 1 in the hereinbefore described housing accommodations for a period from April 1, 1947, to and including June 30, 1947, rentals in excess of the maximum legal rental established for said accommodation, in that defendant charged said tenant during said period for rental for said accommodation the sum of \$60.00 per month of said period, that the legal ceiling rent for said accommodation was the sum of \$41.50, constituting a monthly overcharge of \$18.50 for a period of 3 months or a total overcharge of \$55.50. That defendants demanded, collected and received from tenant, M. W. Callaway of House No. 6, in

said hereinbefore described accommodations for the period from and including August 1st, 1945, to and including June 30th, 1947, rentals in excess of the legal ceiling therefor; that the legal ceiling rent on said accommodation for said period was the sum of \$16.50 per month; that the defendant charged said tenant for each and every month the sum of \$31.50, constituting an overcharge of \$15.00 per month for a period of 23 months, a total overcharge of \$345.00 for said period.

For the Second Cause of Action Plaintiff complains and alleges:

I.

That plaintiff is the duly appointed and qualified Housing Expediter, Office of the Housing Expediter, an agency of the United States Government, created by the Veterans' Emergency Housing Act of 1946 as amended, (50 U.S.C.A. App. Sec. 1821 et seq.) and bring this action as such Housing Expediter pursuant to the Housing and Rent Act of 1947 (50 U.S.C.A. App. Sec. 1881-1902) as extended and amended by Public Laws 422 and 464 of the 80th Congress, hereinafter referred to as the Act.

II.

That jurisdiction of this action is vested in the above-entitled Court under Sec. 206(b) of the Act.

III.

That the defendants, H. M. Gochmour and Mrs. H. M. Gochmour, husband and wife, at all times herein mentioned were the landlords of certain housing accommodations consisting of one 2-story

dwelling house and 6 frame houses, all situated in Route 4, Pierce Street, in the City of Wenatchee, Washington, and within the Wenatchee Defense Rental Area.

IV.

That in the judgment of the Expediter, the defendants and each of them as landlord and manager have violated the provisions of the Act and of the regulations issued thereto and will continue to violate such Act in such regulation by demanding, receiving and collecting from tenants occupying the housing accommodations hereinbefore described in Paragraph III. of this Complaint, rentals in excess of the maximum legal rents fixed and established by law for such accommodations.

V.

That the violations herein complained of are set forth specifically and in detail in Exhibit "A" attached hereto, which Exhibit "A" is by reference made a part of this paragraph and complaint as fully as though set forth in detail herein.

Wherefore plaintiff prays judgment on his first cause of action:

1. That an order be entered in the above-entitled cause requiring and directing the defendants to repay to the tenant, Keith Van Etten, for the period from April 1, 1947, to June 30, 1947, overcharges in the amount of \$55.50; and to M. W. Callaway of House No. 6 from the period August 1, 1945, to June 30, 1947, overcharges in the amount of \$52.50.

Plaintiff further prays judgment on his second cause of action:

1. That the defendants be required by order of this Court to refund to Dorothy Petrie, tenant occupying House No. 4 for the period from April 13, 1948, to May 13, 1948, overcharges in the amount of \$18.50; to Keith Van Etten, tenant of House No. 1, for the period from July 1st, 1947, to and including July 1st, 1948, a period of 13 months, overcharges in the total amount of \$240.50; to Joe Soden, tenant occupying House No. 2, from April 12, 1948, to May 16, 1948, overcharges in the total amount of \$17.50.

Plaintiff further prays judgment on his second cause of action:

2. For an Injunction and Restraining Order enjoining and restraining the defendants and each of them, their agents and employees, from demanding, collecting, or receiving rentals on any of their housing accommodations situated at Route 4, Pierce Street, in Wenatchee, Washington, in excess of the Maximum legal ceiling rentals fixed and established by law.

3. That plaintiffs have and recover costs and disbursements herein.

4. And be accorded such other relief as may be equitable in the premises.

Dated at Seattle, Washington, this 9th day of July, 1948.

CLINTON J. CRANDALL,

ROY C. FOX,

Attorneys for Plaintiff.

EXHIBIT "A"

H. M. Gochnour, et al—Rt. 4, Pierce Street
Wenatchee, Wash.

House No. 4, Tenant, Dorothy Petrie; Rental Period, 4/13/48 to 5/13/48 (1); Max. Leg. Rent, \$31.50; Rent Charged, \$50.00; Overcharge (per mo.), \$18.50; Total Overcharge, \$18.50.

House No. 4, Tenant, Keith Van Etten; Rental Period, 7/1/47 to and inc. 7/1/48 (13); Max. Leg. Rent, \$41.50; Rent Charged, \$60.00; Overcharge, (per mo.), \$18.50; Total Overcharge, \$240.50.

House No. 2, Tenant Joe Soden; Rental Period, 4/12/48 to 5/16/48 (1 mo. 4 days); Max. Leg. Rent, \$25.00; Rent Charged, \$40.00; Overcharge (per mo.), \$15.00; Total Overcharge, \$17.50.

[Endorsed]: Filed July 12, 1948.

[Title of District Court and Cause.]

MOTION TO DISMISS

Come Now the Defendants above named by their attorney, Frank P. Weaver, and move the Court as follows:

I.

To dismiss Plaintiff's first cause of action in the above-entitled matter for the reason and upon the grounds that said first cause of action failed to state a claim against these Defendants or either of them upon which relief can be granted.

II.

To dismiss Plaintiff's second cause of action in the above-entitled matter for the reason and upon the grounds that said second cause of action fails to state a claim against said Defendants or either of them upon *which* relief can be granted.

Dated this 6th day of August, 1948.

FRANK P. WEAVER,
Attorney for Defendants.

[Endorsed]: Filed August 6, 1948.

[Title of District Court and Cause.]

OPINION OF THE COURT

Clinton J. Crandall, Roy C. Fox, 3314 White Building, Seattle 1, Washington, Attorneys for Plaintiff.

Frank P. Weaver, 204 Columbia Building, Spokane 8, Washington, Attorney for Defendants.

Before Driver, District Judge.

Defendants' motion to dismiss the first cause of action of the complaint raises the question whether this Court can order a landlord to repay to his tenant rental collected in excess of the legal maximum, established under the Emergency Price Control Act of 1942,¹ in an action commenced by the Housing

¹56 Stat. 23, as amended, 56 Stat. 765, 58 Stat. 632 (Stablization Extension Act of 1944), 59 Stat. 306 and 60 Stat. 664. The volume of U.S.C.A. in which the original Act was included was replaced in 1944. See 50 U.S.C.A. Appendix 901, et seq.

Expediter more than a year after the termination of the Act.

The complaint was filed July 12, 1948. The first cause of action alleges that from April 1, 1947, to June 30, 1947, defendants, as landlords, collected from a certain tenant rental in excess of the legal maximum. The prayer asks that the defendants be required to repay to the tenant the amount of the overcharge.

The Price Control Act finally terminated on June 30, 1947, but it contained a saving clause to the effect that as to any offense committed or right or liability incurred prior to its termination date, the provisions of the Act should "be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense."² Unless plaintiff's first cause of action for restitution to the tenant comes within that saving clause, it must be dismissed.

Plaintiff concedes that an action brought under Sec. 205(e) of the Act,³ usually referred to as a "treble damage action," would be barred by the one-year limitation imposed by the provisions of that section. He claims, however, that he is not seeking any legal remedy provided for in Sec. 205(e), but is pursuing a different, independent, equitable remedy, available to him under Sec. 205(a) (50 U.S.C.A. Appendix, 925(a)), which reads as follows:

²50 U.S.C.A. Appendix (1947 pocket part) 901(b).

³50 U.S.C.A. Appendix (1947 pocket part) 925(e).

“Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act (section 904 of this Appendix), he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provisions, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.”

It has been held, as plaintiff asserts, that when the equity jurisdiction of a court has been invoked in a proper case, arising under Sec. 205(a), the court may, in the exercise of its broad, traditional, equity powers, order repayment to the tenant of rental overcharges. *Porter v. Warner*, 328 U. S. 395. The crucial question in the present case, however, is whether there is any basis for the exercise of equity jurisdiction at all under Sec. 205(a) in an action brought after the termination of the Act. The section authorizes application to an “appropriate court” only for two specific purposes, namely, to enjoin violation of the Act and to enforce compliance with its provisions. It authorizes the court, in order to accomplish such purposes, to grant a “permanent or temporary injunction, restraining order, or other order.” In *Porter v. Warner Co.*, *supra*, an action for both injunctive relief and restitution, the Supreme Court held that to do full justice and award complete relief, the District Court,

as an incidental by-product of the exercise of its equity functions, could order restitution. The majority opinion (see pages 399 and 400) points out that enforcement of restitution to the tenant of illegally collected overcharges may be justified as a proper "other order" under Sec. 205(a) on either of two theories, first, as an "equitable adjunct" to a decree enjoining violation of the Act, or second, as an appropriate means of assisting to enforce compliance with the Act.

In *Creedon v. Randolph*, 165 F. (2d) 918, also cited by plaintiff, the Administrator of Price Controls brought an action under Sec. 205(a) to compel a landlord to pay back to a tenant rental collected in excess of the legal maximum. The action was commenced after the one-year limitation against an action by the tenant for damages had run and the Administrator did not ask for a prohibitory injunction against future violations. The trial court concluded that there was not sufficient legal basis for ordering restitution in the exercise of the court's equity powers. The Court of Appeals reversed. It held that the lower court should have exercised its discretion to determine whether restitution should be ordered as an aid to enforcement of "this law," since requiring "restitution of overcharges tends to enforce the law prohibiting them."

In each of the cited cases the action was commenced and disposed of in the trial court before the termination of the Price Control Act. In the instant case, however, the Act had expired before the complaint was filed. The saving clause, which authorizes "any proper suit" to enforce rights or lia-

“Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act (section 904 of this Appendix), he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provisions, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.”

It has been held, as plaintiff asserts, that when the equity jurisdiction of a court has been invoked in a proper case, arising under Sec. 205(a), the court may, in the exercise of its broad, traditional, equity powers, order repayment to the tenant of rental overcharges. *Porter v. Warner*, 328 U. S. 395. The crucial question in the present case, however, is whether there is any basis for the exercise of equity jurisdiction at all under Sec. 205(a) in an action brought after the termination of the Act. The section authorizes application to an “appropriate court” only for two specific purposes, namely, to enjoin violation of the Act and to enforce compliance with its provisions. It authorizes the court, in order to accomplish such purposes, to grant a “permanent or temporary injunction, restraining order, or other order.” In *Porter v. Warner Co.*, *supra*, an action for both injunctive relief and restitution, the Supreme Court held that to do full justice and award complete relief, the District Court,

as an incidental by-product of the exercise of its equity functions, could order restitution. The majority opinion (see pages 399 and 400) points out that enforcement of restitution to the tenant of illegally collected overcharges may be justified as a proper "other order" under Sec. 205(a) on either of two theories, first, as an "equitable adjunct" to a decree enjoining violation of the Act, or second, as an appropriate means of assisting to enforce compliance with the Act.

In *Creedon v. Randolph*, 165 F. (2d) 918, also cited by plaintiff, the Administrator of Price Controls brought an action under Sec. 205(a) to compel a landlord to pay back to a tenant rental collected in excess of the legal maximum. The action was commenced after the one-year limitation against an action by the tenant for damages had run and the Administrator did not ask for a prohibitory injunction against future violations. The trial court concluded that there was not sufficient legal basis for ordering restitution in the exercise of the court's equity powers. The Court of Appeals reversed. It held that the lower court should have exercised its discretion to determine whether restitution should be ordered as an aid to enforcement of "this law," since requiring "restitution of overcharges tends to enforce the law prohibiting them."

In each of the cited cases the action was commenced and disposed of in the trial court before the termination of the Price Control Act. In the instant case, however, the Act had expired before the complaint was filed. The saving clause, which authorizes "any proper suit" to enforce rights or lia-

bilities incurred prior to termination, could not then cover suits in equity under Sec. 205(a) either to enjoin future violation of the Act or to enforce compliance with the Act for the obvious reason that the Act had ceased to exist. Since equitable jurisdiction to enter an injunction decree or compliance order had died with the Act, the incidental and dependent power to order restitution, likewise, had expired.

Plaintiff points out that while Congress permitted the Price Control Act to terminate June 30, 1947, it immediately enacted the Housing and Rent Act of 1947,⁴ and thus continued in operation essential control of rentals. He argues that a court of equity may, in order to assist in carrying out the purpose of Congress to combat inflation in the housing rental field, order restitution of rental overcharges under the old Act to aid in the enforcement of the new one.

The Housing and Rent Act is not, in any sense, an extension or continuation of the Price Control Act, but a wholly new and independent statute. It is narrower in scope, does not have the same sanctions for enforcement, and differs in other respects, which I shall not detail here, from the Price Control Act.

The power of this court to order restitution or overcharges under an expired statute cannot be derived from the desirability of aiding in the enforcement of some other and different statute. I

⁴61 Stat. 193; 50 U.S.C.A. Appendix (1947 pocket part) 1881 et seq.

find no justification for such an extraordinary extension of the equity powers of the court in the provisions of either the old or the new Act.

The motion to dismiss the first cause of action of plaintiff's complaint will be granted.

SAM M. DRIVER,

United States District Judge.

Dated: This 28th day of December, 1948.

Copy mailed the Attorney General, West Publishing Co., and each attorney this 4th day of January, 1949.

A. A. LaFRAMBOISE,
Clerk.

[Endorsed]: Filed December 28, 1948.

District Court of the United States for the Eastern
District of Washington, Northern Division

Civil Action No. 755

TIGHE E. WOODS, Housing Expediter, Office of
the Housing Expediter,

Plaintiff,

vs.

H. M. GOCHNOUR and MRS. H. M. GOCH-
NOUR, His Wife,

Defendants.

ORDER RE: MOTION TO DISMISS

This Matter came on for the consideration of the above-entitled Court upon the Motion of Defendants to Dismiss the two separate Causes of Action set

forth in Plaintiff's Complaint; Plaintiff appeared by his attorney, Roy C. Fox, and defendants appeared by their attorney, Frank P. Weaver; the Court having considered said pleadings and argument of counsel and the request of Roy C. Fox as counsel for Plaintiff to strike from Plaintiff's second Cause of Action and from Exhibit "A" attached thereto all reference to house No. 6 occupied by M. W. Callaway and to strike from the prayer of said Complaint that portion of the prayer relating to house No. 6 occupied by M. W. Callaway, and counsel having filed written briefs herein, and the Court having considered the same and having filed its Memorandum Opinion herein and being fully advised in the premises:

It Is Therefore, Ordered, Adjudged, and Decreed:

First: That Defendants' Motion to Dismiss Plaintiff's first Cause of Action be, and the same herewith is, granted.

Second: That the Clerk of the above-entitled Court be, and he herewith is, authorized and directed to strike from the second Cause of Action and from Exhibit "A" attached to Plaintiff's Complaint all reference to house No. 6 occupied by M. W. Callaway and to strike from the first paragraph of the prayer relating to Plaintiff's Complaint the following: "To M. W. Callaway, tenant of House No. 6, for the period from July 1, 1947, to April 1, 1948, overcharges in the total amount of \$150.00."

Third: That Defendants' Motion to Dismiss

Plaintiff's second Cause of Action be, and the same herewith is, denied.

Fourth: That Defendants shall have two weeks from entry of this Order in which to file their Answer herein.

Done in open Court this 14th day of January, 1949.

SAM M. DRIVER,
Judge.

Presented by:

FRANK P. WEAVER,
Attorney for Defendants.

Copy received this 10th day of January, 1949;
Notice of Presentment waived.

ROY C. FOX,
Attorney for Plaintiff.

[Endorsed]: Filed January 14, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: H. M. Gochmour and Mrs. H. M. Gochmour,
Defendants, and to your attorney, Frank P.
Weaver:

You and Each of You will please take notice that the plaintiff, Tighe E. Woods, Housing Expediter, appeals to the United States Circuit Court of Appeals for the 9th Circuit, from that portion of the Order filed in the above-entitled Court and cause on the 14th day of January, 1949, and signed by the Court on the 14th day of January, 1949, and reading as follows:

“First: That Defendants’ Motion to Dismiss Plaintiff’s first cause of Action be, and the same herewith is, granted.”

Dated at Seattle, Washington, this 21st day of January, 1949.

CLINTON J. CRANDALL,
ROY C. FOX,
Attorneys for Plaintiff.

Copy mailed to Appellee’s Counsel, 1/28/49.

A. A. LaFRAMBOISE,
Clerk.

[Title of Court and Cause.]

AFFIDAVIT OF SERVICE BY MAIL

State of Washington,
County of King—ss.

Jeanette Bossart, being first duly sworn, deposes and says: That she is a citizen of the United States, over the age of eighteen (18) years; not a party to the above-entitled action, and competent to be a witness in said action; that she served the attached Notice of Appeal in the above-entitled case on Mr. Frank P. Weaver, Attorney for defendants, by mail on the 21st day of January, 1949, by enclosing a true and correct copy of said Notice of Appeal in a franked, sealed envelope, directed and addressed to: Mr. Frank P. Weaver, Attorney at Law, 204 Columbia Building, Spokane 8, Washington, and by depositing the same in the United States Post Office at Seattle, Washington, on the 21st day of January, 1949.

JEANETTE BOSSART.

Subscribed and sworn to before me this 21st day of January, 1949.

[Seal] CLINTON J. RANDALL,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed January 24, 1949.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America,

Eastern District of Washington—ss.

I, A. A. LaFramboise, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify the foregoing typewritten pages numbered from 1 to 19, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and all other proceedings in the above-entitled cause, as are necessary to the hearing of the appeal therein in the United States Court of Appeals, as called for by the appellants in his Designation of Record on Appeal, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on appeal from that portion of the Order filed in said District Court on the 14th day of January, 1949, granting Defendants' Motion to Dismiss Plaintiff's First Cause of Action,—to the United States Court of Appeals for the Ninth Judicial Circuit, San Francisco, California.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at Spokane in said District this 7th day of February, A.D. 1949.

[Seal] /s/ A. A. LaFRAMBOISE,
Clerk of the U. S. District Court, Eastern District
of Washington.

[Endorsed]: No. 12181. United States Court of Appeals for the Ninth Circuit. Tighe E. Woods, Housing Expediter, Office of the Housing Expediter, Appellant, vs. H. M. Gochmour and Mrs. H. M. Gochmour, His Wife, Appellee. Transcript of Record. Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Filed February 9, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12181

TIGHE E. WOODS, Housing Expediter, Office of
the Housing Expediter,

Plaintiff,

vs.

H. M. GOCHNOUR and MRS. H. M. GOCH-
NOUR, his wife,

Defendants.

PLAINTIFF'S STATEMENT OF POINTS
ON APPEAL

The District Court Erred in,

1. Dismissing first claim stated in Plaintiff's Complaint on ground that action for equitable relief in nature of restitution did not survive termination of Emergency Price Control Act of 1942, as amended.

2. Holding that no action for equitable relief under Section 205(a) of Emergency Price Control Act of 1942 could be brought and carried on after termination of that Act.

Dated at Seattle, Washington, this 24th day of February, 1949.

/s/ CLINTON J. CRANDALL,

/s/ ROY C. FOX,

Attorneys for Plaintiff.

[Endorsed]: Filed February 28, 1949. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

AFFIDAVIT OF SERVICE BY MAIL

State of Washington,
County of King—ss.

Jeanette Bossart, being first duly sworn, deposes and says: That she is a citizen of the United States, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness in said action; that she served the attached Designation of Record on Appeal and Plaintiff's Statement of Points on Appeal in the above-entitled case on Frank P. Weaver, Attorney for defendants, by mail on the 24th day of February, 1949, by enclosing true and correct copies of said Designation of Record on Appeal and Plaintiff's Statement of Points on Appeal in a franked, sealed envelope, directed and addressed to: Weaver and Jones, Lawyers, Attention Frank P. Weaver, 204 Columbia Building, Spokane 8, Washington, and by depositing the same in the United States Post Office at Seattle, Washington, on the 24th day of February, 1949.

/s/ JEANETTE BOSSART.

Subscribed and sworn to before me this 24th day of February, 1949.

[Seal] /s/ CLINTON J. CRANDALL,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed February 28, 1949. Paul P. O'Brien, Clerk.

No. 12181

**In the United States Court of Appeals
for the Ninth Circuit**

**TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE
HOUSING EXPEDITER, APPELLANT**

v.

**H. M. GOCHNOUR AND MRS. H. M. GOCHNOUR, HIS
WIFE, APPELLEES**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN
DIVISION**

BRIEF FOR APPELLANT

ED DUPREE,

General Counsel,

HUGO V. PRUCHA,

Assistant General Counsel,

LOUISE F. MCCARTHY,

Special Litigation Attorney,

*Office of the Housing Expediter, Office of the General Counsel,
Temporary "E" Building, Washington 25, D. C.*

FILED

APR 15 1949

PAUL R. O'BRIEN,

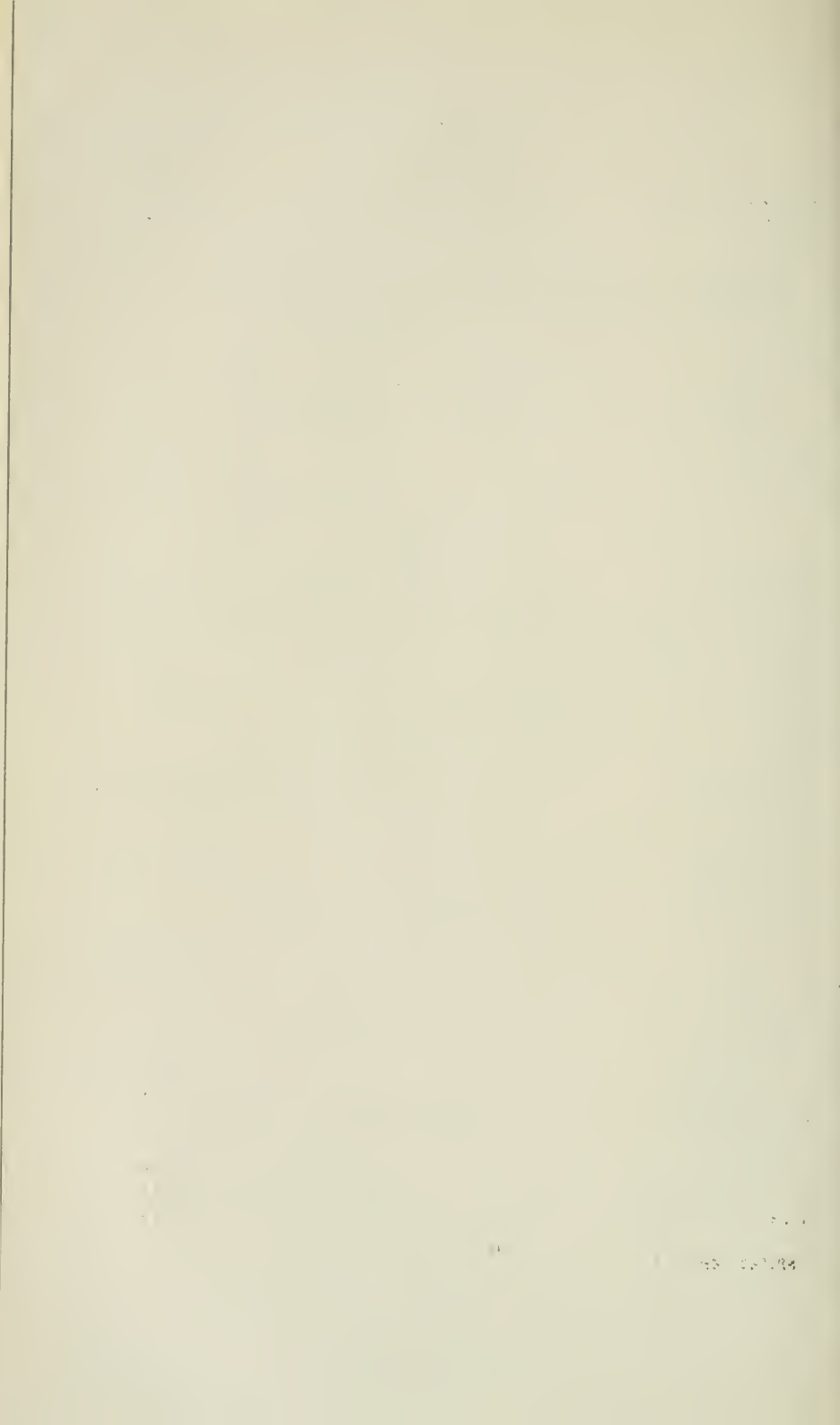
CLERK

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In the United States Court of Appeals for the Ninth Circuit

No. 12181

TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE
HOUSING EXPEDITER, APPELLANT

v.

H. M. GOCHNOUR AND MRS. H. M. GOCHNOUR, HIS
WIFE, APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN
DIVISION

BRIEF FOR APPELLANT

STATEMENT OF THE CASE

This is an appeal by the Housing Expediter, plaintiff below, from a final judgment of the United States District Court for the Eastern District of Washington, Northern Division (R. 16), which refused to award restitution of rent overcharges to a tenant in an action brought pursuant to Sections 205 (a) of the Emergency Price Control Act, as amended (50 U. S. C. App. Secs. 925 (a)) (R. 13).

Plaintiff filed suit against defendant on July 12, 1948 (R. 2). The complaint contained two causes of action, one under the Emergency Price Control Act of 1942, as amended (R. 2) and the second under the

Housing and Rent Act of 1947, as amended. The action under the Housing and Rent Act of 1947, as amended, is not involved in this appeal.

For the first cause of action plaintiff alleged that defendants were the landlords of one 2-story dwelling house and six frame houses situated in Route 4, Pierce Street, Wenatchee, Washington, within the Wenatchee Defense-Rental Area (R. 3); that defendants had violated the provisions of the Emergency Price Control Act and the regulations issued pursuant thereto by collecting rents in excess of the maximum legal rentals established for House #1, from April 1, 1947 to June 30, 1947 at the rate of \$18.50 per month, or a total of \$55.50 (R. 3) and by collecting rents in excess of the maximum legal rentals established for House #6 from August 1, 1945 to June 30, 1947 at the rate of \$15.00 per month, or a total of \$345.00 (R. 4).

In his prayer on the first cause of action plaintiff prayed for the entry of an order requiring and directing the defendants to repay to the tenant of House #1 overcharges in the sum of \$55.50 and to the tenant of House #6 overcharges in the sum of \$52.50 (R. 5).

On August 6, 1948 defendants filed a motion to dismiss the complaint (R. 7). After argument the Court filed an opinion refusing to order restitution on the ground that there was no justification for such an exercise of the equity powers of the court after termination of the Emergency Price Control Act of 1942, as amended (R. 8).

On January 14, 1949 the Court entered an order dismissing the first cause of action and denying the

motion to dismiss the second cause of action and ordering the defendants to file an answer to the second cause of action in two weeks (R. 13).

Plaintiff has appealed (R. 16) from that part of the order which reads: "First: That Defendants' Motion To Dismiss Plaintiff's first Cause of Action be, and the same herewith is, granted" (R. 16).

POINTS RELIED ON

I

The District Court erred in dismissing first claim stated in Plaintiff's Complaint on ground that action for equitable relief in nature of restitution did not survive termination of Emergency Price Control Act of 1942, as amended.

II

The District Court erred in holding that no action for equitable relief under Section 205 (a) of Emergency Price Control Act of 1942 could be brought and carried on after termination of that Act.

ARGUMENT

I

The District Court erred in dismissing first claim stated in plaintiff's complaint on ground that action for equitable relief in nature of restitution did not survive termination of Emergency Price Control Act of 1942, as amended

The facts established for the purposes of this appeal are that, during the period when the Emergency Price Control Act of 1942, as amended (hereinafter referred to as the Act), was in effect, defendants collected excess rents on houses #1 and #6, Pierce Street, Wenatchee, Washington. More than a year

after the Act had terminated plaintiff sued defendants, seeking to compel them to make restitution under Section 205 (a) of the amounts collected in excess of the maximum rents established under the Act.

Plaintiff relied on Sections 1 (b), 4 (a), and 205 (a) of the Act which read as follows:

SECTION 1 (b). The provisions of this Act, and all regulations, orders, price schedules, and requirements, thereunder, shall terminate on June 30, 1947, or upon the date of a proclamation by the President, or upon the date specified by a concurrent resolution of the two Houses of the Congress, declaring that the further continuance of the Authority granted by this Act is not necessary in the interest of the national defense and security, whichever date is the earlier; except that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations, orders, price schedules and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action or prosecution with respect to any such right, liability or offense.

SECTION 4 (a). It shall be unlawful, regardless of any contract, agreement, lease or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule

effective in accordance with the provisions of section 206, or of any regulation, order or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt or agree to do any of the foregoing.

SECTION 205 (a). Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order or other order shall be granted, without bond.

The opinion of the trial court shows the single issue upon which he based his ruling dismissing the complaint as to the first cause of action. It is that an order of restitution under section 205 (a) is not a "proper suit, action or prosecution" with respect to an offense committed or right or liability incurred prior to the termination of rent control so that it survives the expiration of the Act.

The Court stated that prior to June 30, 1947, a proper action for restitution could have been sustained and cited *Porter v. Warner Holding Co.*, 328 U. S. 395. It also agreed that, under *Creedon v. Randolph*, 165 F. 2d 918 (C. C. A. 5th), there would have been no statute of limitations applicable to such action. It held, however, that neither of the cited cases was authority for permitting the bringing of

such an action after the termination of the statute since both had been commenced and disposed of in the trial court prior to June 30, 1947. The wording of section 1 (b) makes no such distinction. If a right was incurred prior to June 30, 1947, section 1 (b) says that the provisions of the Act shall be treated as remaining in force to sustain a proper suit with respect thereto. It does not exclude Section 205 (a) from its saving power. Section 205 (a) is clearly one of "the provisions of the Act" mentioned in Section 1 (b), which are treated as remaining in effect.

As the Supreme Court stated in *Fleming v. Mohawk Co.*, 331 U. S. 111, at p. 119:

Liabilities incurred prior to the lifting of controls are not thereby washed out. *United States v. Hark*, 320 U. S. 531, 536; *Utah Junk Co. v. Porter*, 328 U. S. 29, 44; *Collins v. Porter*, 328 U. S. 46, 49. And Congress has explicitly provided that accrued rights and liabilities under the Emergency Price Control Act are preserved whether or not suit is started prior to the termination date of the Act.

See also, *Gordon v. Porter*, 156 F. 2d 799 (C. C. A. 9th) and *Porter v. Provenzano*, 159 F. 2d 47 (C. C. A. 9th) Cert. den. 331 U. S. 816.

If there was a liability before June 30, 1947 nothing occurred on that date or thereafter to destroy it. That a liability had been created for which the remedy was a suit in equity for an order enjoining restitution is clear not only from *Porter v. Warner Holding Co.*, *supra*, and *Creedon v. Randolph*, *supra*, but also from *Bowles v. Skaggs*, 151 F. 2d 817 (C.

C. A. 6th), a suit against an executor of an estate who sold a single refrigerator at an over-ceiling price. In a suit under Section 205 (a) for restitution alone the District Court refused to take jurisdiction. The Court of Appeals reversed saying: "To deny the Administrator power to act in cases where, as here, restitution rather than a prohibitory injunction is the only *remedy*, would be to subvert the purposes of the Act." (Italics added.)

The case of *United States v. Carter*, decided by the Court of Appeals for the Fifth Circuit, 171 F. 2d 530, although it arose under the Veterans' Emergency Housing Act of 1946, is authority for appellant's position. In that case the United States sued to compel restitution of overcharges made on the sale of houses to veterans. Suit was brought after the repeal of the provisions of the Veterans' Emergency Housing Act which authorized the regulation of maximum prices for houses erected with priorities assistance. The only saving clause was Title 1, Section 109 U. S. C. A. which is the general saving clause as to any repealed legislation.¹ The Court below dismissed on the ground that the repealing Act had not saved the remedies. The Court of Appeals reversed on the ground that the remedies remained in effect. The court's action is wholly inconsistent with the theory that restitution is dependent upon the existence of an act whose enforcement may be bolstered by its use.

In the case of *Keele v. Holt*, 171 F. 2d 980 (C. C. A. 5th), the Court awarded restitution to purchasers of

¹ See Appendix, p. 14.

overpriced houses a year after the pertinent regulations and statutes had expired.

The specific point was raised in the case of *Creedon v. Brooks* in the Northern District of Indiana (No. 812 Civil) where restitution to the tenant under section 205 (a) was ordered in a suit commenced after July 1, 1947. The Court of Appeals for the Seventh Circuit affirmed from the bench on October 13, 1948 (Civil No. 9589, not yet reported). By its affirmance, the Seventh Circuit Court gave tacit approval to the following language contained in the memorandum opinion and order of the Court below:

The defendant also contends that because this action was commenced after July 1, 1947, only the tenant is entitled to bring an action under the provisions of the Housing and Rent Act of 1947. This suit is brought under the Emergency Price Control Act of 1942 for alleged violations occurring while that Act governed maximum legal rental charges in defense-rental areas. Section 1 (b) of the Act, Title 50, War App. U. S. C. A. Par. 901 (b), clearly shows that Congress intended violations of the Emergency Price Control Act to be prosecuted after termination of the statute and in accordance with its provisions. (Unreported memorandum opinion by Judge Luther M. Swygert, October 30, 1947, in *Creedon v. Raymond Brooks*, No. 812 Civil, N. D. Indiana, South Bend Division.)

See also, *Woods v. Boyle*, 77 F. Supp. 881 (W. D. Mich.), in which in a suit commenced on October 3, 1947, the Court awarded restitution in the amount of \$400 for overcharges under the Emergency Price Control Act and \$650 under the Housing and Rent

Act of 1947. The award was affirmed *per curiam* by the Court of Appeals for the Sixth Circuit on February 7, 1949 (Civil No. 10760, not yet reported). The point at issue here was not however raised by the appellant landlord.

Similarly, on November 17, 1948, this Court in *Woods v. Rose*, 171 F. 2d 290 (C. C. A. 9th), remanded a complaint for trial without comment, although it included a cause of action under Section 205 (a) of the Emergency Price Control Act. ^{4/}

In *Woods v. Turner*, 172 F. 2d 313 (C. C. A. 10), the only remedy sought was restitution. The suit was not filed until September 1947, after the termination of the Emergency Price Control Act and the Court of Appeals remanded the case to the District Court for determination of the amount to be restored to the tenants under Section 205 (a) of the Emergency Price Control Act.

Contrary to the view expressed below, the case of *Creedon v. Randolph*, 165 F. 2d 918 (C. C. A. 5th), does not justify the conclusions reached in this case. It is true that the case was commenced prior to June 30, 1947, and that it came before the District Court in May 1947. However, the trial court ordered judgment to be entered for the defendant because no present violations were threatened; they could not have been in view of the imminent expiration of the Act. Argument in the appellate court occurred in the fall of 1947. In January 1948, we find the appellate court reversing the trial court, saying:

The remedy invoked under section 205 (a) appertains only to the Administrator as rep-

On April 11, 1949, the District Court for the Western District of Washington (Judge Lloyd Black sitting) in *Woods v. Allen* (No. 2095 W.D. Wash.) awarded restitution in a similar case relying on *Fleming v. Mohawk*

representative of the Government in the enforcement of *this law*. That to require restitution of overcharges tends to enforce the law prohibiting them, no one would deny.

If the Court of Appeals had agreed with this District Court's belief that restitution is an equitable remedy to be exercised only in respect to an existing law, its proper action would have been to affirm the judgment for defendant, since there was no existing law to be enforced in January 1948. Instead of doing so, however, it reversed, saying "here the Administrator did not ask for a prohibitory injunction against future violations, and probably would not have gotten it if he had;" doubtless, because the Act had expired.

But although there was no legislation which required enforcement and no prohibitory injunction was appropriate, the Court still granted restitution as a continuing equitable remedy after the expiration of the Act, in order to bring about defendant's compliance with the Act.

II

The District Court erred in holding that no action for equitable relief under Section 205 (a) of Emergency Price Control Act of 1942 could be brought and carried on after termination of that act

The District Court considered itself without authority to exercise its equitable jurisdiction under the provisions of Section 205 (a) because the Act had expired. It refused to give any weight to the argument propounded by plaintiff below that orders entered under Section 205 (a) would be an effective aid in the enforcement of the Housing and Rent Act of

1947. This argument should have been considered and enlarged upon. As the Supreme Court emphasized in *Porter v. Warner Holding Company*, *supra*, the public interest is involved.

It is readily apparent * * * that a decree compelling one to disgorge profits, rents or property acquired in violation of the Emergency Price Control Act may properly be entered by a District Court once its equity jurisdiction has been invoked under Section 205 (a).

* * * * *

When the Administrator seeks restitution under Section 205 (a) he does not request the court to award statutory damages to the purchaser or tenant or to pay to such person part of the penalties which go to the United States Treasury in a suit by the Administrator under Section 205 (e). Rather he asks the court to act in the public interest by restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant. Such action is within the recognized power and within the highest tradition of a court of equity. * * *

Or as the Court stated in *Schine Chain Theatres v. United States*, 334 U. S. 110, at p. 128, in discussing divestiture, "Like restitution it merely deprives a defendant of the gains from his wrongful conduct. It is an equitable remedy designed in the public interest to undo what could have been prevented had the defendants not outdistanced the government in their unlawful project."

Surely the extension of the provisions of the Act to secure the enforcement of accrued liabilities will

not be complete if the Government is prevented from overtaking those defendants who originally outdistanced them. On the contrary unless the Government can vindicate the public interest in this manner, unscrupulous persons will be encouraged to anticipate the termination of every legislative program by a few weeks or months knowing that the probabilities are that in the closing days of a program, officials will be too preoccupied to exercise the same vigilance as they had previously shown and that on the fatal day they will have nothing more to fear from courts of equity. The outdistancing will not be temporary but permanent.

In the instant case, the situation is presented in its clearest aspect. There never was an end of the Rent Control program. The rates and registrations of the Emergency Price Control Act were carried over to the Housing and Rent Act of 1947 (Section 204 (b) (1)).² The provisions of the latter were carried back to the former. Courts of equity were given the same type of equitable jurisdiction under both statutes, and the same construction previously given by the Courts to Section 205 (a) of the Emergency Price Control Act has now been given to Section 206 (b)³ of the Housing and Rent Act of 1947, *Woods v. Hillcrest Terrace*, 170 F. 2d 980 (C. C. A. 8th). Congress could not have intended to so restrict the equity jurisdiction of the Federal Courts from doing complete equity, nor may any such restriction upon

² See Appendix, p. 14.

³ See Appendix, p. 15.

the broad powers of the equity courts be implied (cf. *Hecht v. Bowles*, 321 U. S. 321, 329 et seq.).

CONCLUSION

It is respectfully submitted that the Court below erred in dismissing plaintiff's first cause of action and that the judgment should be reversed with instructions to the District Court to take jurisdiction to determine whether or not orders of restitution in the amounts of \$55.50 and \$52.50 should be entered.

Respectfully submitted.

ED DUPREE,

General Counsel,

HUGO V. PRUCHA,

Assistant General Counsel,

LOUISE F. MCCARTHY,

Special Litigation Attorney,

*Office of the Housing Expediter, Office of
the General Counsel, Temporary "E"
Building, Washington 25, D. C.*

APPENDIX

TITLE 1 U. S. C.

§ 109. Repeal of statutes as affecting existing liabilities.

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. July 30, 1947, c. 388, § 1, 61 Stat. 633.

Housing and Rent Act of 1947, as amended.

§ 204 (b) (1) Subject to the provisions of paragraphs (2) and (3) of this subsection, during the period beginning on the effective date of this title and ending on the date this title ceases to be in effect, no person shall demand, accept, or receive any rent for the use or occupancy of any controlled housing accommodations greater than the maximum rent established under the authority of the Emergency Price Control Act of 1942, as amended, and in effect with respect thereto on June 30, 1947: Provided, however, That the Housing Expediter shall, by regulation or order, make such indi-

vidual and general adjustments in such maximum rents in any defense-rental area or any portion thereof, or with respect to any housing accommodations or any class of housing accommodations within any such area or any portion thereof, as may be necessary to remove hardships or to correct other inequities, or further to carry out the purposes and provisions of this title. In the making of adjustments to remove hardships due weight shall be given to the question as to whether or not the landlord is suffering a loss in the operation of the housing accommodations.

§ 206 (b) Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage in any act or practice which constitutes or will constitute a violation of any provision of this title, he may make application to any Federal, State, or Territorial court of competent jurisdiction, for an order enjoining such act or practice, or for an order enforcing compliance with such provision, and upon a showing by the Housing Expediter that such person has engaged or is about to engage in any such act or practice a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

No. 12183

United States
Court of Appeals

For the Ninth Circuit.

GEORGE B. McCLYMAN, ELIZABETH SPENCER SAUERS, ELIZABETH BRAU and WILLIS N. URIE,

Appellants,

vs.

WILBERT C. HAMILTON,

Appellee.

Transcript of Record

Upon Appeal from the United States District Court
the Southern District of California
Central Division

AUG - 5 1949

No. 12183

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the Southern District of California
Central Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellants:

GLENN A. LANE,
H. H. SLATE,
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Los Angeles 14, Calif.

For Appellee:

SYLVAN Y. ALLEN,
ERNEST R. UTLEY,
639 S. Spring St.,
Los Angeles 14, Calif.

In the District Court of the United States, Southern District of California, Central Division

In Bankruptcy Proceedings No. 45310-Y
Involuntary Petition in Bankruptcy

In the Matter of:

WILBERT C. HAMILTON, Individually, and the
Partnership Known as BRUNSON AND
BUNCH, Composed of WILLARD E. BRUN-
SON, DEON BUNCH, and the Said WIL-
BERT C. HAMILTON,

Alleged Bankrupts.

CREDITORS' PETITION

To the Honorable the Judges of the District Court
of the United States, Southern District of Cali-
fornia, Central Division:

The petition of George B. McClyman, 639 South
Spring Street, Los Angeles, California, and Eliza-
beth Spencer Sauers of 1034 Kendall Drive, San
Gabriel, California, and Elizabeth Brau, of 221 Bel-
mont Avenue, Los Angeles, California, respectfully
represents:

(1) Wilbert C. Hamilton, of 1067 West 83rd
Street, City and County of Los Angeles, State of
California, and Willard E. Brunson, of 1183 Cren-
shaw Boulevard, City and County of Los Angeles,
State of California, and Deon Bunch, 405 West
Adams Boulevard, City and County of Los Angeles,
State of California, are co-partners trading under
the firm name of Brunson and Bunch, and your pe-

itioner file this petition jointly against said partnership and the said Wilbert C. Hamilton, individually.

(2) The said partnership has had its principal place of business at 610 South Broadway, City and County of Los Angeles, State of California, within the above judicial district, and the [2*] said Wilbert C. Hamilton has had his principal place of business at 639 South Spring Street, City and County of Los Angeles, State of California, within the above judicial district, both for the six months immediately preceding the filing of this petition.

(3) Within six years next preceding the filing of this petition, neither said partnership nor said Wilbert C. Hamilton has been known or has conducted any business by or under any assumed, trade, or other names or designations, according to the information and belief of petitioner.

(4) The said partnership and said Wilbert C. Hamilton each owes debts to the amount of One Thousand Dollars (\$1,000.00) or over.

(5) The said Wilbert C. Hamilton is not a wage-earner or a farmer.

(6) The said partnership is not a farmer.

(7) The said partnership has not been dissolved, but business operations are not being continued.

(8) Your petitioners are creditors of said partnership and said Wilbert C. Hamilton, having unsecured claims against them, fixed as to liability and

liquidated in amount, amounting in the aggregate to Five Hundred Dollars (\$500.00) or over. The nature and amount of your petitioners' claims are as follows:

(a) The claim of your petitioner, George B. McClyman, is in the amount of Twenty Thousand Three Hundred Fifty-Nine Dollars (\$20,359.00) for money lent by him to said partnership and the said Wilbert C. Hamilton during the nine months' period immediately preceding the filing of this petition.

(b) The claim of your petitioner, Elizabeth Spencer Sauers, is in the amount of Four Thousand Seven Hundred One Dollars and 52 cents (\$4,701.52) for money lent by her to said partnership and the said Wilbert C. Hamilton during the nine months' period immediately preceding the filing of this petition. [3]

(c) The claim of your petitioner, Elizabeth Brau, is in the amount of Eighteen Thousand Thirty Dollars and 90 cents (\$18,030.90) for money lent by her to said partnership and the said Wilbert C. Hamilton during the nine months' period immediately preceding the filing of this petition.

(9) Within four months next preceding the filing of this petition, the said partnership and said Wilbert C. Hamilton each committed an act of bankruptcy, in that on the 7th of August, 1947, they transferred the sum of One Thousand Four Hundred Seventy-Five Dollars (\$1,475.00) to John P. Strutzel and Anthony M. Cioffi, doing business

as "Aircraft Stamping Company," 822 South Date Street, Alhambra, California, a co-partnership, and one of their creditors. Said transfer was made while each alleged bankrupt was insolvent and while each had more than one creditor, and was made with intent to prefer the said John P. Strutzel and Anthony M. Cioffi, doing business as "Aircraft Stamping Company" over their other creditors.

(10) Within four months next preceding the filing of this petition, the said partnership and said Wilbert C. Hamilton each committed an act of Bankruptcy, in that on the 3rd day of July, 1947, they transferred the sum of Six Hundred Dollars (\$600.00) to George B. McClyman, one of their creditors. Said transfer was made while each alleged bankrupt was insolvent and while each had more than one creditor, and was made with intent to prefer the said George B. McClyman, over their other creditors.

(11) Within four months next preceding the filing of this petition, the said partnership and said Wilbert C. Hamilton each committed an act of bankruptcy, in that on the 17th day of July, 1947, they transferred the sum of Two Thousand One Hundred Dollars (\$2,100.00) to L. L. Farris and Company, one of their creditors. Said transfer was made while each alleged bankrupt was insolvent, and while each had more than one creditor, and was made [4] with intent to prefer the said L. L. Farris and Company over their other creditors.

(12) Within four months next preceding the fil-

ing of this petition, the said partnership and said Wilbert C. Hamilton each committed an act of bankruptcy, in that on the 7th day of July, 1947, they transferred the sum of Eighty-Nine Dollars and 28 cents (\$89.28) to Elizabeth Brau, one of their creditors. Said transfer was made while each alleged bankrupt was insolvent, and while each had more than one creditor, and was made with intent to prefer the said Elizabeth Brau over their other creditors.

(13) Within four months next preceding the filing of this petition, the said partnership and said Wilbert C. Hamilton each committed an act of bankruptcy, in that on the 8th day of July, 1947, they transferred the sum of Fifty-Three Dollars and 93 cents (\$53.93) to Elizabeth Brau, one of their creditors. Said transfer was made while each alleged bankrupt was insolvent, and while each had more than one creditor, and was made with intent to prefer the said Elizabeth Brau over their other creditors.

(14) Within four months next preceding the filing of this petition, the said partnership and said Wilbert C. Hamilton each committed an act of bankruptcy, in that on the 16th day of June, 1947, they transferred the sum of Twelve Thousand Dollars (\$12,000.00) to Fletcher Baughn, one of their creditors. Said transfer was made while each alleged bankrupt was insolvent, and while each had more than one creditor, and was made with intent to prefer the said Fletcher Baughn over their other creditors.

(15) Within four months next preceding the filing of this petition, the said partnership and said Wilbert C. Hamilton each committed an act of bankruptcy, in that on the 16th day of June, 1947, they transferred the sum of Five Thousand Dollars (\$5,000.00) to Nellie Fath, one of their creditors. Said transfer was made while each alleged bankrupt was insolvent, and while each [5] had more than one creditor, and was made with intent to prefer the said Nellie Fath over their other creditors.

Wherefore, your petitioners pray that service of this petition, with a subpoena, may be made upon said partnership and said Wilbert C. Hamilton, as provided in the Act of Congress relating to bankruptcy, and that said partnership and said Wilbert C. Hamilton, individually, may each be adjudged by the Court to be a bankrupt within the purview of said Act.

Dated this 26th of September, 1947.

/s/ GEORGE B. McCLYMAN,
Petitioner.

/s/ ELIZABETH SPENCER
SAUERS,
Petitioner.

/s/ ELISABETH BRAU,
Petitioner.

LANE & CASEY and
H. H. SLATE,
Attorneys for Petitioners.

By /s/ H. H. SLATE. [6]

State of California,
County of Los Angeles—ss.

George B. McClyman, Elizabeth Spencer Sauers and Elizabeth Brau, the petitioners above named, do hereby make solemn oath that the statements contained in the foregoing petition, subscribed by them, are true.

/s/ GEORGE B. McCLYMAN,
Petitioner.

/s/ ELIZABETH SPENCER
SAUERS,
Petitioner.

/s/ ELISABETH BRAU,
Petitioner.

Subscribed and sworn to before me this 26th day of September, 1947.

[Seal] /s/ G. N. WILLIAMS,
Notary Public in and for Said
County and State.

[Endorsed]: Filed Sept. 26, 1947. [7]

[Title of District Court and Cause.]

ORDER OF GENERAL REFERENCE

At Los Angeles, California, in said district on the 29th day of September, 1947;

Whereas, a petition was filed in this court on the 26th day of September, 1947, against Brunson and

Bunch, a copartnership, composed of Willard E. Brunson, Deon Bunch, and Wilbert C. Hamilton, alleged bankrupt above named, praying that it be adjudged a bankrupt under the Act of Congress relating to bankruptcy, and good cause now appearing therefor;

It is ordered that the above-entitled proceeding be, and it hereby is, referred to Hugh L. Dickson, Esq., one of the referees in bankruptcy of this court, to take such further proceedings therein as are required and permitted by said Act, and that the said Brunson and Bunch, a copartnership, composed of Willard E. Brunson, Deon Bunch, and Wilbert C. Hamilton, shall henceforth attend before said referee and submit to such orders as may be made by him or by a judge of this court relating to said bankruptcy.

/s/ BEN HARRISON,
District Judge.

[Endorsed]: Filed Sept. 29, 1947. [8]

[Title of District Court and Cause.]

ORDER OF GENERAL REFERENCE

At Los Angeles, California, in said district on the 29th day of September, 1947;

Whereas, a petition was filed in this court on the 26th day of September, 1947, against Wilbert C. Hamilton, alleged bankrupt above named, praying

that he be adjudged a bankrupt under the Act of Congress relating to bankruptcy, and good cause now appearing therefor;

It is ordered that the above-entitled proceeding be, and it hereby is, referred to Hugh L. Dickson, Esq., one of the referees in bankruptcy of this court, to take such further proceedings therein as are required and permitted by said Act, and that the said Wilbert C. Hamilton shall henceforth attend before said referee and submit to such orders as may be made by him or by a judge of this court relating to said bankruptcy.

/s/ BEN HARRISON,
District Judge.

[Endorsed]: Filed Sept. 29, 1947. [9]

[Title of District Court and Cause.]

ANSWER TO INVOLUNTARY PETITION
IN BANKRUPTCY

To the Honorable Judges of the District Court of
the United States, Southern District of California,
Central Division:

Comes now Wilbert C. Hamilton and for himself alone and none other files this his answer to the Creditors' Petition filed herein and in that respect denies and alleges:

I.

Answering paragraph I thereof, admits that said Wilbert C. Hamilton is a resident of the City of Los

Angeles, County of Los Angeles, State of California, with residence at 1067 West 83rd Street; denies that said Wilbert C. Hamilton is now or at any time ever was a copartner with Willard E. Brunson or Deon Bunch or either thereof, or ever engaged in any transaction or trading as a copartner with either said Brunson or Bunch or under the firm name of Brunson & Bunch or any other firm name or name of any copartnership as a partner therein or thereof; and further denies that Wilbert C. Hamilton ever made or entered into any copartnership or agreement for or of copartnership with either said Brunson or Bunch or both thereof or at all, [10] and further except as herein otherwise specified, admitted or denied, denies generally and specifically each and every of the allegations of paragraph 1 of said Petition;

II.

Answering paragraph 2, said Wilbert C. Hamilton admits that he has a place of business at 639 South Spring Street in the City of Los Angeles, California, and has maintained said place of business continuously for more than one year last past; admits that a copartnership composed of said Brunson and Bunch is engaged in business at 610 South Broadway in the City of Los Angeles, California; that except as herein specifically admitted denies generally and specifically each and every of the allegations of said paragraph 2;

III.

Answering paragraph 3, said Wilbert C. Hamilton admits that he has not conducted any business

under any assumed trade name or designation, but that he has no information or belief in the matter sufficient for him otherwise to answer the allegations of said paragraph 3, and therefore on that ground except as herein specifically admitted, denies generally and specifically each and every of the allegations of said paragraph 3;

IV.

Answering paragraph 4, said Wilbert C. Hamilton denies that he is indebted in the sum of \$1,000 or any sum of money; that he has no information or belief in the matter sufficient to enable him to specifically or otherwise deny the allegations of paragraph 4, and therefore, except as herein specifically admitted, denies generally and specifically each and every of the allegations of paragraph 4;

V.

Answering paragraph 7 thereof, the said Wilbert C. Hamilton has no information or belief in the matter sufficient to enable him to answer and therefore on that ground denies the allegations of paragraph 7;

VI.

Answering paragraph 8, said Wilbert C. Hamilton denies that the petitioners or any or either of them is a creditor of Wilbert C. Hamilton or that they have any claim, secured or otherwise, against him, either in the aggregate of \$500 or more than \$500 or any sum of money or at all, or either in any fixed or liquidated amount;

Denies that George B. McClyman has any claim against the said Wilbert C. Hamilton in the amount of \$20,359 or any sum of money or at all, or that said McClyman ever lent the sum of \$20,359 or any sum of money to the said Wilbert C. Hamilton, either during the nine-month period immediately preceding the filing of this complaint or at any time or at all;

Denies that Elizabeth Spencer Sauers has any claim against the said Wilbert C. Hamilton in the amount of \$4,701.52 or any sum of money or at all, or that said Elizabeth Spencer Sauers ever lent the sum of \$4,701.52 or any sum of money to the said Wilbert C. Hamilton either during the nine-month period immediately preceding the filing of this complaint or at any time or at all;

Denies that Elisabeth Brau has any claim against the said Wilbert C. Hamilton in the amount of \$18,030.90 or any sum of money or at all, or that said Elisabeth Brau ever lent the sum of \$18,030.90 or any sum of money to the said Wilbert C. Hamilton either during the nine-month period immediately preceding the filing of this complaint or at any time or at all;

That said Wilbert C. Hamilton has no information or belief in the matter with reference to the allegations of said paragraph 8 in [12] respect to claims against said alleged copartnership of said Brunson and Bunch, and therefore basing his denial on that ground denies the allegations of said paragraph 8 and further, except as herein other-

wise specifically denied or admitted in respect to said Wilbert C. Hamilton, denies generally and specifically each and every of the allegations of said paragraph 8;

VII.

Answering paragraph 9, said Wilbert C. Hamilton denies that he is bankrupt or ever committed any act of bankruptcy within four months next preceding the filing of said Petition, or on the 7th day of August, 1947, or at all; denies that he ever transferred the sum of \$1475.00 or any sum of money to John P. Strutzel or to Anthony M. Cioffi or to Aircraft Stamping Company, or said Strutzel and Cioffi, doing business as said Aircraft Stamping Company, or to any thereof or at all, or that either said Strutzel or Cioffi or said Aircraft Stamping Company or any thereof are or ever were creditors of said Hamilton; and further denies that said Hamilton is insolvent or that any alleged transfer was made while the said Wilbert C. Hamilton was insolvent or at all; that the said Wilbert C. Hamilton has no information or belief in the matter sufficient to enable him to answer the allegations of paragraph 9 as to said copartnership of said Brunson and Bunch, and therefore on that ground denies generally and specifically the allegations of said paragraph 9 and further, except as hereinbefore specifically admitted or denied, said Wilbert C. Hamilton otherwise denies generally and specifically each and every the allegations of said paragraph 9;

VIII.

Answering paragraph 10, said Wilbert C. Hamilton denies that he is bankrupt or ever committed any act of bankruptcy within four months next preceding the filing of said Petition, or on the 3rd day of July, [13] 1947, or at all;

Denies that he ever transferred the sum of \$600 or any sum of money to George B. McClyman, or that said McClyman is or ever was one of the creditors of said Hamilton; and further denies that said Hamilton is bankrupt or that any alleged transfer was made while said Wilbert C. Hamilton was insolvent or at all;

That said Wilbert C. Hamilton has no information or belief in the matter sufficient to enable him to answer the allegations of paragraph 10 as to said copartnership of said Brunson and Bunch, and therefore on that ground denies generally and specifically the allegations of said paragraph 10, and further, except as herein specifically admitted or denied, said Wilbert C. Hamilton otherwise denies generally and specifically each, every and all the allegations contained in said paragraph 10;

IX.

Answering paragraph 11, said Wilbert C. Hamilton denies that he is bankrupt or ever committed any act of bankruptcy within four months next preceding the filing of said Petition, or on the 17th day of July, 1947, or at all;

Denies that he ever transferred the sum of \$2,100 or any sum of money to L. L. Farris and Company,

or that L. L. Farris and Company is or ever was one of the creditors of said Wilbert C. Hamilton; and further denies that said Wilbert C. Hamilton is bankrupt or that any alleged transfer was made while said Wilbert C. Hamilton was insolvent or at all;

That said Wilbert C. Hamilton has no information or belief in the matter sufficient to enable him to answer the allegations of paragraph 11 as to said copartnership of said Brunson and Bunch, and therefore on that ground denies generally and specifically the allegations of said paragraph 11, and further, except as herein specifically admitted or denied, said Wilbert C. Hamilton otherwise denies generally [14] and specifically each and every the allegations of said paragraph 11;

X.

Answering paragraph 12, said Wilbert C. Hamilton denies that he is bankrupt or ever committed any act of bankruptcy within four months next preceding the filing of said Petition, or on the 7th day of July, 1947, or at all;

Denies that he ever transferred the sum of \$89.28 or any sum of money to Elisabeth Brau, or that said Elisabeth Brau is or ever was one of the creditors of said Wilbert C. Hamilton; and further denies that said Wilbert C. Hamilton is bankrupt or that any alleged transfer was made while said Wilbert C. Hamilton was insolvent or at all;

That said Wilbert C. Hamilton has no information or belief in the matter sufficient to enable him

to answer the allegations of paragraph 12 as to said copartnership of said Brunson and Bunch, and therefore on that ground denies generally and specifically the allegations of said paragraph 12, and further, except as herein specifically admitted or denied, said Wilbert C. Hamilton otherwise denies generally and specifically each and every the allegations of said paragraph 12;

XI.

Answering paragraph 13, said Wilbert C. Hamilton denies that he is bankrupt or ever committed any act of bankruptcy within four months next preceding the filing of said Petition, or on the 8th day of July, 1947, or at all;

Denies that he ever transferred the sum of \$53.93 or any sum of money to Elisabeth Brau, or that said Elisabeth Brau is or ever was one of the creditors of said Wilbert C. Hamilton; and further denies that said Wilbert C. Hamilton is bankrupt or that any alleged transfer was made while said Wilbert C. Hamilton was insolvent or at all;

That said Wilbert C. Hamilton has no information or belief in the matter sufficient to enable him to answer the allegations of [15] paragraph 13 as to said copartnership of said Brunson and Bunch, and therefore on that ground denies generally and specifically the allegations of said paragraph 13, and further, except as herein specifically admitted or denied, said Wilbert C. Hamilton otherwise denies generally and specifically each and every the allegations of said paragraph 13;

XII.

Answering paragraph 14, said Wilbert C. Hamilton denies that he is bankrupt or ever committed any act of bankruptcy within four months next preceding the filing of said Petition, or on the 16th day of June, 1947, or at all;

Denies that he ever transferred the sum of \$12,000 or any sum of money to Fletcher Baughn, or that said Fletcher Baughn is or ever was one of the creditors of said Wilbert C. Hamilton; and further denies that said Wilbert C. Hamilton is bankrupt or that any alleged transfer was made while said Wilbert C. Hamilton was insolvent or at all;

That said Wilbert C. Hamilton has no information or belief in the matter sufficient to enable him to answer the allegations of paragraph 14 as to said copartnership of said Brunson and Bunch, and therefore on that ground denies generally and specifically the allegations of said paragraph 14, and further, except as herein specifically admitted or denied, said Wilbert C. Hamilton otherwise denies generally and specifically each and every the allegations of said paragraph 14;

XIII.

Answering paragraph 15, said Wilbert C. Hamilton denies that he is bankrupt or ever committed any act of bankruptcy within four months next preceding the filing of said Petition, or on the 16th day of June, 1947, or at all;

Denies that he ever transferred the sum of \$5,000 or any sum of money to Nellie Fath, or that said

Nellie Fath is or ever was one of the creditors of said Wilbert C. Hamilton; and further denies that said [16] Wilbert C. Hamilton is bankrupt or that any alleged transfer was made while said Wilbert C. Hamilton was insolvent or at all;

That said Wilbert C. Hamilton has no information or belief in the matter sufficient to enable him to answer the allegations of paragraph 15 as to said copartnership of said Brunson and Bunch, and therefore on that ground denies generally and specifically the allegations of said paragraph 15, and further, except as herein specifically admitted or denied, said Wilbert C. Hamilton otherwise denies generally and specifically each and every the allegations of said paragraph 15.

Wherefore, the said Wilbert C. Hamilton prays judgment that in respect to said Wilbert C. Hamilton said Creditors' Petition be denied, and that said proceedings be dismissed.

Dated: This 2nd day of October, 1947, at Los Angeles, California.

/s/ SYLVAN Y. ALLEN,

Attorney for Wilbert C.
Hamilton. [17]

State of California,
County of Los Angeles—ss.

Wilbert C. Hamilton, being by me first duly sworn, deposes and says: that he is the Alleged Bankrupt in the above-entitled action; that he has read the foregoing Answer to Involuntary Petition

in Bankruptcy—Creditor's Petition, and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

/s/ WILBERT C. HAMILTON.

Subscribed and sworn to before me this 2nd day of October, 1947.

[Seal] /s/ VIRGINIA R. KERR,
Notary Public in and for said County and State of
California.

[Endorsed]: Filed Oct. 2, 1947.

[Title of District Court and Cause.]

PETITION AND ORDER TO FILE FIRST
AMENDED INVOLUNTARY PETITION
IN BANKRUPTCY

To the Honorable the Judges of the District Court
of the United States, Southern District of Cali-
fornia, Central Division:

Come Now George B. McClyman, Elizabeth Spencer Sauers, Elizabeth Brau, and Willis N. Urie, petitioning creditors, by their attorneys, Lane & Casey, and H. H. Slate, and allege that heretofore Creditors' Petition was filed and since the filing thereof, it appears that the petitioners have ascertained additional facts which should be brought before the

Court, and have prepared a first amended petition, and now ask and petition the Court to forthwith and without notice make and issue an Order permitting the filing of said First Amended Petition.

LANE & CASEY, and
H. H. SLATE,
Attorneys for Petitioners.

By /s/ H. H. SLATE.

It Is So Ordered.

/s/ HUGH L. DICKSON,
Referee.

Filed Oct. 27, 1947. (Referee's Clerk.)

[Endorsed]: Filed Oct. 28, 1947. [20]

[Title of District Court and Cause.]

FIRST AMENDED INVOLUNTARY PETI-
TION IN BANKRUPTCY

Creditors' Petition

To the Honorable the Judges of the District Court
of the United States, Southern District of Cali-
fornia, Central Division:

The petition of George B. McClyman, 639 South
Spring Street, Los Angeles, California; and Eliza-
beth Spencer Sauers, 1034 Kendall Drive, San Ga-
briel, California; and Elizabeth Brau, 221 Belmont
Avenue, Los Angeles, California; and John W.
Mires, 2059 West 84th Place, Los Angeles, Cali-

fornia; and Willis N. Urie, 1324 Tenth Street, Santa Monica, California, respectfully represents:

(1) Wilbert C. Hamilton, of 1067 West 83rd Street, City and County of Los Angeles, State of California, and Willard E. Brunson of 1183 Crenshaw Boulevard, City and County of Los Angeles, State of California, and Deon Bunch, 405 West Adams Boulevard, City and County of Los Angeles, State of California, are co-partners trading under the firm name of Brunson and Bunch, and your petitioners file this petition jointly against said partnership and the said Wilbert C. Hamilton, individually.

(2) The said partnership has had its principal place of business at 610 South Broadway, City and County of Los Angeles, State [21] of California, within the above judicial district, and the said Wilbert C. Hamilton has had his principal place of business at 639 South Spring Street, City and County of Los Angeles, State of California, within the above judicial district, both for the six months immediately preceding the filing of this petition.

(3) Within six years next immediately preceding the filing of this petition, neither said partnership nor said Wilbert C. Hamilton has been known or has conducted any business by or under any assumed, trade, or other names or designations, according to the information and belief of petitioners.

(4) The said partnership and the said Wilbert C. Hamilton each owes debts to the amount of One Thousand Dollars (\$1,000.00) or over.

(5) The said Wilbert C. Hamilton is not a wage-earner or a farmer.

(6) The said partnership and the said Wilbert C. Hamilton, Willard E. Brunson, and Deon Bunch, and neither of them, have been or are engaged principally or at all as farmers, or in the tillage of the soil in agriculture or horticulture, and are not nor have they operated a banking, municipal, railroad, or building and loan business.

(7) The said partnership has not been dissolved, but business operations are not being continued.

(8) Your petitioners are creditors of said partnership and said Wilbert C. Hamilton, having unsecured claims against them, fixed as to liability and liquidated in amount, amounting in the aggregate to Five Hundred Dollars (\$500.00) or over. The nature and amount of your petitioner's claims are as follows:

(a) The claim of your petitioner, George B. McClyman, is in the amount of Twenty Thousand Three Hundred Fifty-Nine Dollars (\$20,359.00) for money lent by him to said partnership and the said Wilbert C. Hamilton during the nine months' period immediately [22] preceding the filing of this petition.

(b) The claim of your petitioner, Elizabeth Spencer Sauers, is in the amount of Four Thousand Seven Hundred One Dollars and 52 cents (\$4,701.52), for money lent by her to said partnership and the said Wilbert C. Hamilton during

the nine months' period immediately preceding the filing of this petition.

(c) The claim of your petitioner, Elizabeth Brau, is in the amount of Eighteen Thousand Thirty Dollars and 90 cents (\$18,030.90), for money lent by her to said partnership and the said Wilbert C. Hamilton during the nine months' period immediately preceding the filing of this petition.

(d) The claim of your petitioner, John W. Mires, is in the amount of One Thousand Dollars (\$1,000.00), for money lent by him to said partnership and the said Wilbert C. Hamilton during the nine months' period immediately preceding the filing of this petition.

(e) The claim of your petitioner, Willis N. Urie, is in the amount of Five Thousand Dollars (\$5,000.00) for money lent by him to said partnership and the said Wilbert C. Hamilton during the nine months' period immediately preceding the filing of this petition.

(9) The debts due to each of the claimants, the petitioning creditors herein, were, at the time of the filing of the original petition herein, and are now, past due, owing, and unpaid.

(10) Each of the petitioning creditors herein was an unsecured creditor at each of the times hereinafter alleged that the bankrupts transferred funds while insolvent.

(11) Within four months next immediately preceding the filing of this petition, the said partnership and said Wilbert C. Hamilton each committed

an act of bankruptcy, in that on the 7th day of August, 1947, they transferred the sum of One Thousand Four Hundred Seventy - Five Dollars (\$1,475.00) to John P. Strutzel and Anthony M. Cioffi, doing business as "Aircraft Stamping Company," [23] 822 South Date Street, Alhambra, California, a co-partnership, and one of their creditors. Said transfer was made while each alleged bankrupt was insolvent, and while each had more than one creditor, and was made with intent to prefer the said John P. Strutzel and Anthony M. Cioffi, doing business as "Aircraft Stamping Company," over their other creditors. By said transfer the said creditor receiving said payment obtained a greater per cent of payment of his claim than did other creditors of the same class, including your petitioners.

(12) Within four months next immediately preceding the filing of this petition, the said partnership and said Wilbert C. Hamilton each committed an act of Bankruptcy, in that on the third day of July, 1947, they transferred the sum of Six Hundred Dollars (\$600.00) to George B. McClyman, one of their creditors. Said transfer was made while each alleged bankrupt was insolvent, and while each had more than one creditor, and was made with intent to prefer the said George B. McClyman, over their other creditors. By said transfer the said creditor receiving said payment obtained a greater per cent of payment of his claim than did other creditors of the same class, including your petitioners.

(13) Within four months next immediately preceding the filing of this petition, the said partner-

ship and said Wilbert C. Hamilton each committed an act of bankruptcy, in that on the 17th day of July, 1947, they transferred the sum of Two Thousand One Hundred Dollars (\$2,100.00) to L. L. Farris and Company, one of their creditors. Said transfer was made while each alleged bankrupt was insolvent, and while each had more than one creditor, and was made with intent to prefer the said L. L. Farris and Company over their other creditors. By said transfer the said creditor receiving said payment obtained a greater per cent of payment of his claim than did other creditors of the same class, including your petitioners.

(14) Within four months next immediately preceding the [24] filing of this petition, the said partnership and said Wilbert C. Hamilton each committed an act of bankruptcy, in that on the 7th day of July, 1947, they transferred the sum of Eighty-Nine Dollars and 28 cents (\$89.28) to Elizabeth Brau, one of their creditors. Said transfer was made while each alleged bankrupt was insolvent, and while each had more than one creditor, and was made with intent to prefer the said Elizabeth Brau over their other creditors. By said transfer the said creditor receiving said payment obtained a greater per cent of payment of his claim than did other creditors of the same class, including your petitioners.

(15) Within four months next immediately preceding the filing of this petition, the said partnership and said Wilbert C. Hamilton each committed

an act of bankruptcy, in that on the 8th day of July, 1947, they transferred the sum of Fifty-three Dollars and 93 cents (\$53.93) to Elizabeth Brau, one of their creditors. Said transfer was made while each alleged bankrupt was insolvent, and while each had more than one creditor, and was made with intent to prefer the said Elizabeth Brau over their other creditors. By said transfer the said creditor receiving said payment obtained a greater per cent of payment of his claim than did other creditors of the same class, including your petitioners.

(16) Within four months next immediately preceding the filing of this petition, the said partnership and said Wilbert C. Hamilton each committed an act of bankruptcy, in that on the 16th day of June, 1947, they transferred the sum of Twelve Thousand Dollars (\$12,000.00) to Fletcher Baughn, one of their creditors. Said transfer was made while each alleged bankrupt was insolvent, and while each had more than one creditor, and was made with intent to prefer the said Fletcher Baughn over their other creditors. By said transfer the said creditor receiving said payment obtained a greater per cent of payment of his claim than did other creditors of the same class, including your petitioners. [25]

(17) Within four months next immediately preceding the filing of this petition, the said partnership and said Wilbert C. Hamilton each committed an act of bankruptcy, in that on the 16th day of June, 1947, they transferred the sum of Five Thousand Dollars (\$5,000.00) to Nellie Fath, one of their creditors. Said transfer was made while each al-

leged bankrupt was insolvent, and while each had more than one creditor, and was made with intent to prefer the said Nellie Fath over their other creditors. By said transfer the said creditor receiving said payment obtained a greater per cent of payment of his claim than did other creditors of the same class, including your petitioners.

(18) At all the times herein mentioned and at the time of the filing of the original creditors' petition, and now, the partnership known as Brunson and Bunch, and each of the partners, Willard E. Brunson, Deon Bunch, and Wilbert C. Hamilton, were insolvent, and all of the assets and property of the partnership and of said individuals, in the aggregate, at its fair salable value or at its fair reasonable value, was and is insufficient to pay all of the just debts of the partnership.

(19) That within four months next immediately preceding the filing of this Petition, and on June 17, 1947, at Los Angeles, California, the said partnership and the said Wilbert C. Hamilton, with the intent to hinder, defraud, and delay their creditors, and each of them, transferred the sum of Ten Thousand Dollars (\$10,000.00) without consideration, to The Mary E. Hamilton Trust, an alleged common law trust, wholly operated, controlled, and managed by Wilbert C. Hamilton. By said act, the creditors of the said alleged bankrupts herein, and each of them, were, in fact, hindered, delay and defrauded, and your petitioners were hindered, delayed and defrauded, and your petitioners were prevented from collecting their [26] respective just claims against

the said bankrupts, and each of them. The said transfer, on June 17, 1947, was made and done at a time when the said alleged bankrupts, and each of them, were insolvent. The said alleged bankrupts, and each of them, are now and have been for all of the four months immediately preceding the filing of this Petition, and were also on June 17, 1947, insolvent.

Wherefore, your petitioners pray that service of this petition, with a subpoena, may be made upon said partnership and the said Wilbert C. Hamilton, as provided in the Act of Congress relating to bankruptcy, and that said partnership and said Wilbert C. Hamilton, individually, may each be adjudged by the Court to be a bankrupt within the purview of said Act.

Dated this 23 day of October, 1947.

/s/ GEORGE B. McCLYMAN,
Petitioner.

/s/ ELIZABETH SPENCER
SAUERS,
Petitioner.

/s/ ELISABETH BRAU,
Petitioner.

/s/ WILLIS N. URIE,
Petitioner.

LANE & CASEY and
H. H. SLATE,
Attorneys for Petitioners.

By /s/ H. H. SLATE. [27]

State of California,
County of Los Angeles—ss.

George B. McClyman, one of the petitioners above named, does hereby make solemn oath that the statements contained in the foregoing petition, subscribed by him, are true to his knowledge, information and belief.

/s/ GEORGE B. McCLYMAN,
Petitioner.

Subscribed and sworn to before me this 23rd day of October, 1947.

[Seal] /s/ G. N. WILLIAMS,
Notary Public in and for Said
County and State.

State of California,
County of Los Angeles—ss.

Elizabeth Spencer Sauers, one of the petitioners above named, does hereby make solemn oath that the statement contained in the foregoing petition, subscribed by her, are true to her knowledge, information and belief.

/s/ ELIZABETH SPENCER
SAUERS,
Petitioner.

Subscribed and sworn to before me this 23rd day of October, 1947.

[Seal] /s/ G. N. WILLIAMS,
Notary Public in and for Said
County and State. [28]

State of California,
County of Los Angeles—ss.

Elizabeth Brau, one of the petitioners above named, does hereby make solemn oath that the statements contained in the foregoing petition, subscribed by her, are true to her knowledge, information and belief.

/s/ ELISABETH BRAU,
Petitioner.

Subscribed and sworn to before me this 23rd day of October, 1947.

[Seal] /s/ G. N. WILLIAMS,
Notary Public in and for Said
County and State.

State of California,
County of Los Angeles—ss.

Willis N. Urie, one of the petitioners above named, does hereby make solemn oath that the statements contained in the foregoing petition, subscribed by him, are true to his knowledge, information and belief.

/s/ WILLIS N. URIE,
Petitioner.

Subscribed and sworn to before me this 24 day of October, 1947.

[Seal] /s/ H. H. SLATE,
Notary Public in and for Said
County and State. [29]

[Title of District Court and Cause.]

ANSWER TO FIRST AMENDED INVOLUNTARY PETITION IN BANKRUPTCY, AND INTERROGATORIES WITH REQUEST THAT THEY BE ANSWERED UNDER OATH, i.e., BY EACH OF THE PETITIONING CREDITORS SEPARATELY

To the Honorable Judges of the District Court of the United States, Southern District of California, Central Division:

Comes now Wilbert C. Hamilton and for himself alone and none other files this his Answer, which is an answer in part, to the First Amended Involuntary Petition in Bankruptcy filed herein, and as to that part which is not answered interrogatories are annexed to be answered under oath by each petitioning creditor. Upon receipt of the answers to the interrogatories annexed this respondent will be in a position to answer as to the remaining allegations not now answered, and leave of Court to so do will be obtained.

I.

Answering paragraph (1) thereof, the said Wilbert C. Hamilton admits that he is a resident of the City of Los Angeles, County of Los Angeles, State of California, residing at 1067 West 83rd Street thereof, and denies that he is now or was at any time a copartner or member of a partnership known as Brunson and Bunch; [40]

II.

Further answering the allegations contained in paragraph (1) of the said First Amended Involuntary Petition, this respondent alleges that the said First Amended Involuntary Petition does not state facts sufficient and clear to establish the fact of partnership as alleged, nor upon what basis the petitioning creditors claim that this respondent is a member of the partnership as alleged, and the respondent requests that the petitioning creditors answer interrogatories 1 to 4 under oath, and said interrogatories when so answered under oath will enable this respondent to make proper answer and prepare his defense;

III.

Answering paragraph (2), said Wilbert C. Hamilton admits that he has a place of business at 639 South Spring Street in the City of Los Angeles, California, and has maintained said place of business continuously for more than one year last past; admits that a copartnership composed of said Brunson and Bunch is engaged in business at 610 South Broadway in the City of Los Angeles, California; that except as herein specifically admitted denies generally and specifically each and every of the allegations of said paragraph (2);

IV.

Answering paragraph (3), said Wilbert C. Hamilton admits that he has not conducted any business under any assumed trade name or designation,

but that he has no information or belief in the matter sufficient for him otherwise to answer the allegations of said paragraph (3), and therefore on that ground except as herein specifically admitted, denies generally and specifically each and every of the allegations of said paragraph (3); [41]

V.

Answering paragraph (4), said Wilbert C. Hamilton denies that he is indebted in the sum of \$1,000 or any sum of money; that he has no information or belief in the matter sufficient to enable him to specifically or otherwise deny the allegations of paragraph (4), and therefore, except as herein specifically admitted, denies generally and specifically each and every of the allegations of paragraph (4);

VI.

Answering paragraph (7) thereof, the said Wilbert C. Hamilton has no information or belief in the matter sufficient to enable him to answer and therefore on that ground denies the allegations of paragraph (7);

VII.

Further answering the allegations contained in paragraph (8) of the First Amended Involuntary Petition, this respondent alleges that the said First Amended Involuntary Petition does not state or contain allegations sufficiently definite and certain to inform this respondent that the petitioning creditors claim to be creditors of the respondent individually or creditors of the copartnership as alleged; nor is

this Involuntary Petition definite and certain as to the nature of the petitioning creditors' claims, whether they are based on written memoranda, nor the manner of creation and terms of payment if any; for these reasons this respondent requests that each petitioning creditor answer as regards his alleged claim or debt the interrogatories annexed which pertain to the matters referred to in paragraph (8) of the Amended Petition. The said interrogatories, when answered under oath, as requested, will enable this respondent to properly answer the allegations contained in paragraph (8) of the First Amended Petition and to prepare this respondent's defense thereto; [42]

VIII.

Answering paragraphs (9) to (17) inclusive, this respondent states that the allegations contained in said paragraphs are not sufficiently definite and certain to enable this respondent to properly and intelligently answer same, in that the said allegations do not contain statements to the effect that the petitioning creditors claim that the creditors alleged to have received preferences were creditors of this respondent individually or creditors of the copartnership as alleged, and also whether the alleged payments charged as preferences were made by the respondent individually or by the copartnership as alleged. For these reasons this respondent requests that each petitioning creditor answer under oath the interrogatories annexed hereto which pertain to the subject matters referred to in the said

paragraphs contained in the First Amended Petition. The answers to the interrogatories given under oath will enable this respondent to properly and intelligently answer these allegations.

IX.

Answering paragraph (18), Wilbert C. Hamilton denies that he is insolvent or that he is or ever was a partner of Willard E. Brunson and Deon Bunch or either thereof, or either or both doing business under the partnership name of Brunson and Bunch; and further, denies generally and specifically each, every and all the allegations of said paragraph 18;

X.

Answering paragraph (19), Wilbert C. Hamilton denies that he transferred the sum of \$10,000 or any sum of money either without consent or at all, to the Mary E. Hamilton Trust on June 17, 1947, or at any time or to hinder, delay or defraud any creditor or with intent to hinder or delay or defraud any creditor, but alleges the fact to be that the sum of \$10,000 was withdrawn from the Betty-Barbara [43] Trust, Mary E. Hamilton, Trustee, together with an additional sum of \$15,000, and all of same was transferred and delivered to the Mary E. Hamilton Trust and that the \$10,000 heretofore withdrawn and paid to the Betty-Barbara Trust, Mary E. Hamilton, Trustee, was paid to Brunson and Bunch on or about the 17th or 18th day of June, 1947, and that an additional sum of \$15,000 was withdrawn from

the Betty-Barbara Trust and through the Mary E. Hamilton Trust was delivered to Brunson and Bunch. That no part of said \$25,000 has been repaid and all of same is due, owing and unpaid from Brunson and Bunch and Willard E. Brunson and Deon Bunch, copartners, and the said Brunson and Bunch and said copartners are indebted to the said Mary E. Hamilton Trust in the said sum of \$10,000; and further, that neither by said act of transferring said \$10,000 or said \$15,000 or said \$25,000 to said Brunson and Bunch did the said Wilbert C. Hamilton hinder, delay or defraud any creditor;

And this answering respondent is informed and believes that each and every of the said petitioners knows the foregoing to be a true statement of the facts and that any allegation or averment to the contrary is false, fraudulent, malicious and untrue and is made without any or any probable cause and wholly for the purpose of injuring and maligning the said Wilbert C. Hamilton and causing him great and irreparable loss in his business and profession, and not otherwise; and the said respondent further denies each, every and all the allegations of said paragraph (19).

Wherefore, having first answered, this defendant prays the Court,

1. For judgment of dismissal in the event that the petitioning creditors shall fail to answer under oath each and every question contained in the interrogatories annexed hereto within the time prescribed by federal statute;

2. That judgment be entered in favor of this respondent on [44] creditors' Petition, and that the adjudication requested by the petitioning creditors be denied;

3. That the said proceedings as regards this respondent be dismissed;

4. That the petitioning creditors be ordered to pay this respondent's costs and reasonable attorney's fees, and that judgment be granted accordingly; and

5. For such other and further relief as this respondent shall be entitled in equity and in law, as the case may be.

/s/ SYLVAN Y. ALLEN,
Attorney for Respondent
Wilbert C. Hamilton.

Filed Nov. 26, 1947. (Referee's Clerk.)

[Endorsed]: Filed Nov. 26, 1947. [45]

[Title of District Court and Cause.]

ANSWER TO FIRST AMENDED INVOLUNTARY PETITION IN BANKRUPTCY

To the Honorable Judges of the District Court of the
United States, Southern District of California,
Central Division:

Comes now Wilbert C. Hamilton and for himself alone and none other files this his Answer to the

First Amended Involuntary Petition in Bankruptcy filed herein, and in that respect denies and alleges:

I.

Answering paragraph (1) thereof, admits that said Wilbert C. Hamilton is a resident of the City of Los Angeles, County of Los Angeles, State of California, with residence at 1067 West 83rd Street; denies that said Wilbert C. Hamilton is now or at any time ever was a copartner with Willard E. Brunson or Deon Bunch or either thereof, or ever engaged in any transaction or trading as a copartner with either said Brunson or Bunch or under the firm name of Brunson & Bunch or any other firm name or name of any copartnership as a partner therein or thereof; and further denies that Wilbert C. Hamilton ever made or entered into any copartnership or agreement for or of copartnership with either said Brunson or Bunch or both thereof or at all [76] and further except as herein otherwise specified, admitted or denied, denies generally and specifically each and every of the allegations of paragraph 1 of said Petition;

II.

Answering paragraph 2, said Wilbert C. Hamilton admits that he has a place of business at 639 South Spring Street in the City of Los Angeles, California, and has maintained said place of business continuously for more than one year last past; admits that a copartnership composed of said Brunson and Bunch is engaged in business at 610 South

Broadway in the City of Los Angeles, California; that except as herein specifically admitted denies generally and specifically each and every of the allegations of said paragraph 2;

III.

Answering paragraph 3, said Wilbert C. Hamilton admits that he has not conducted any business under any assumed trade name or designation, but that he has no information or belief in the matter sufficient for him otherwise to answer the allegations of said paragraph 3, and therefore on that ground except as herein specifically admitted, denies generally and specifically each and every of the allegations of said paragraph 3;

IV.

Answering paragraph 4, said Wilbert C. Hamilton **denies** that he is indebted in the sum of \$1,000 or any sum of money; that he has no information or belief in the matter sufficient to enable him to specifically or otherwise deny the allegations of paragraph 4, and therefore, except as herein specifically admitted, denies generally and specifically each and every of the allegations of paragraph 4; [77]

V.

Answering paragraph 7 thereof, the said Wilbert C. Hamilton has no information or belief in the matter sufficient to enable him to answer and therefore on that ground denies the allegations of paragraph 7;

VI.

Answering paragraph 8, said Wilbert C. Hamilton denies that the petitioners or any or either of them is a creditor of Wilbert C. Hamilton or that they have any claim, secured or otherwise, against him, either in the aggregate of \$500 or more than \$500 or any sum of money or at all, or either in any fixed or liquidated amount;

Denies that George B. McClyman has any claim against the said Wilbert C. Hamilton in the amount of \$20,359 or any sum of money or at all, or that said McClyman ever lent the sum of \$20,359 or any sum of money to the said Wilbert C. Hamilton, either during the nine-month period immediately preceding the filing of the Petition herein or at any time or at all;

Denies that Elizabeth Spencer Sauers has any claim against the said Wilbert C. Hamilton in the amount of \$4,701.52 or any sum of money or at all, or that said Elizabeth Spencer Sauers ever lent the sum of \$4,701.52 or any sum of money to the said Wilbert C. Hamilton either during the nine-month period immediately preceding the filing of this complaint or at any time or at all;

Denies that Elizabeth Brau has any claim against the said Wilbert C. Hamilton in the amount of \$18,030.90 or any sum of money or at all, or that said Elizabeth Brau ever lent the sum of \$18,030.90 or any sum of money to the said Wilbert C. Hamilton either during the nine-month period immediately preceding the filing of the Petition herein, or at any time or at all;

Denies that Willis N. Urie has any claim against the said Wilbert C. Hamilton in the amount of \$5,000.00 or any sum of money or [78] at all, or that said Willis N. Urie ever lent the sum of \$5,000.00 or any sum of money to the said Wilbert C. Hamilton either during the nine-month period immediately preceding the filing of the Petition herein or at any time or at all;

That said Wilbert C. Hamilton has no information or belief in the matter with reference to the allegations of said paragraph 8 in respect to claims against said alleged copartnership of said Brunson and Bunch, and therefore basing his denial on that ground denies the allegations of said paragraph 8 and further, except as herein otherwise specifically denied or admitted in respect to said Wilbert C. Hamilton, denies generally and specifically each and every the allegations of said paragraph 8;

VII.

Answering paragraph 9, Wilbert C. Hamilton denies that any debt is due from him to any of the alleged claimants mentioned or referred to therein, or that any such alleged debt is now or ever was due or past due or owing or unpaid, and denies that any such debt ever existed;

VIII.

Answering paragraph 10, Wilbert C. Hamilton denies that any said alleged petitioning creditors ever were creditors of Wilbert C. Hamilton, either unsecured or otherwise, at the times alleged or at

all, or that the said Wilbert C. Hamilton is now a bankrupt or at any time mentioned in said First Amended Petition ever was a bankrupt or that the said Wilbert C. Hamilton at any said times was or now is insolvent or transferred any fund or funds as in said paragraph 10 alleged;

IX.

Answering paragraph 11, Wilbert C. Hamilton denies that he [79] ever transferred \$1,475.00 or any sum of money to John P. Strutzel or Anthony M. Cioffi or both of them, or either or both of them doing business as Aircraft Stamping Co., or doing business under any other designation, and denies generally and specifically each and every the allegations of said paragraph 11;

X.

Answering paragraph 12, Wilbert C. Hamilton denies that he ever transferred the sum of \$600 or any portion thereof to George B. McClyman, either on the 3rd day or any day of July, 1947, or had any transaction with the said George B. McClyman as in said First Amended Petition alleged or at all; and otherwise denies generally and specifically each, every and all the allegations of said paragraph 12;

XI.

Answering paragraph 13, Wilbert C. Hamilton denies that he ever transferred \$2,100.00 or any sum of money to L. L. Farris & Co. or ever engaged in any transaction touching upon any mat-

ter, cause or thing in respect to the matters alleged in the First Amended Petition regarding L. L. Farris & Co.; and further denies generally and specifically each, every and all the allegations of said paragraph 13;

XII.

Answering paragraph 14, Wilbert C. Hamilton denies that he ever transferred \$89.28 or any sum of money to Elizabeth Brau, or ever engaged in any transaction with the said Elizabeth Brau touching or pertaining to the matters alleged in paragraph 14 of the First Amended Petition; and further denies generally and specifically each, every and all the allegations of said paragraph 14;

XIII.

Answering paragraph 15, Wilbert C. Hamilton denies that he ever transferred \$53.93 or any sum of money to Elizabeth Brau, or ever engaged in any transaction with the said Elizabeth Brau touching or pertaining to the matters alleged in paragraph 15 of the First Amended Petition; and further denies generally and specifically each, every and all the allegations of said paragraph 15;

XIV.

Answering paragraph 16, Wilbert C. Hamilton denies that he transferred \$12,000 or any sum of money to Fletcher Baughn, either as alleged or at all, and further, denies generally and specifically each, every and all the allegations of said paragraph 16;

XV.

Answering paragraph 17, Wilbert C. Hamilton denies that he transferred \$5,000 or any sum of money to Nellie Fath, either as alleged or at all, and further, denies generally and specifically each, every and all the allegations of said paragraph 17;

XVI.

Answering paragraph 18, Wilbert C. Hamilton denies that he is insolvent or that he is or ever was a partner of Willard E. Brunson and Deon Bunch or either thereof, or either or both doing business under the partnership name of Brunson and Bunch; and further, denies generally and specifically each, every and all the allegations of said paragraph 18;

XVII.

Answering paragraph 19, Wilbert C. Hamilton denies that he transferred the sum of \$10,000 or any sum of money either without consent or at all, to the Mary E. Hamilton Trust on June 17, 1947, or at any time or to hinder, delay or defraud any creditor or with [81] intent to hinder or delay or defraud any creditor, but alleges the fact to be that the sum of \$10,000 was withdrawn from the Betty-Barbara Trust, Mary E. Hamilton, Trustee, together with an additional sum of \$15,000, and all of same was transferred and delivered to the Mary E. Hamilton Trust and that the \$10,000 heretofore withdrawn and paid to the Betty-Barbara Trust, Mary E. Hamilton, Trustee, was paid to Brunson and Bunch on or about the 17th or 18th day of June, 1947, and that an additional sum of \$15,000 was

withdrawn from the Betty-Barbara Trust and through the Mary E. Hamilton Trust was delivered to Brunson and Bunch. That no part of said \$25,000 has been repaid and all of same is due, owing and unpaid from Brunson and Bunch and Willard E. Brunson and Deon Bunch, copartners, and the said Brunson and Bunch and said copartners are indebted to the said Mary E. Hamilton Trust in the said sum of \$10,000; and further, that neither by said act of transferring said \$10,000 or said \$15,000 or said \$25,000 to said Brunson and Bunch did the said Wilbert C. Hamilton hinder, delay or defraud any creditor; and this answering respondent is informed and believes that each and every of the said petitioners knows the foregoing to be a true statement of the facts and that any allegation or averment to the contrary is false, fraudulent, malicious and untrue and is made without any or any probable cause and wholly for the purpose of injuring and maligning the said Wilbert C. Hamilton and causing him great and irreparable loss in his business and profession, and not otherwise; and the said Wilbert C. Hamilton further denies each, every and all the allegations of said paragraph 19.

XVIII.

That this Respondent has incurred and will incur expenses and costs and will be required to incur and pay additional sums of money for proper costs and for reasonable attorney's fees in this matter, and is entitled to Order and Judgment of this Court against [82] said petitioning creditors for the aggregate amount thereof.

Wherefore, this Respondent prays judgment as follows:

1. That judgment be entered in favor of this Respondent, Wilbert C. Hamilton, on creditors' Petition and First Amended Involuntary Petition filed herein, and that the adjudication prayed for by petitioning creditors be denied;

2. For judgment and dismissal as to Wilbert C. Hamilton, and that all proceedings herein with reference to said Wilbert C. Hamilton be dismissed and set aside;

3. That judgment and Order be made herein requiring petitioning creditors to pay all proper costs and expenses incurred or paid by Respondent, including Respondent's reasonable attorney's fees; and

4. That such other and further relief and orders be made as may appear to this Honorable Court meet and equitable in the premises.

/s/ SYLVAN Y. ALLEN,

Attorney for Respondent,

Wilbert C. Hamilton. [83]

State of California,

County of Los Angeles—ss.

Wilbert C. Hamilton, being by me first duly sworn, deposes and says: that he is the Respondent in the above-entitled action; that he has read the foregoing Answer to First Amended Involuntary Petition in Bankruptcy and knows the contents

thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

/s/ WILBERT C. HAMILTON.

Subscribed and sworn to before me this 16th day of December, 1947.

[Seal] /s/ VIRGINIA R. KERR,
Notary Public in and for said County and State of
California.

Filed Dec. 17, 1947. (Referee's Clerk.)

[Endorsed]: Filed Dec. 19, 1947.

[Title of District Court and Cause.]

REQUEST FOR JURY TRIAL

To the Honorable Judges of the District Court of
the United States, Southern District of Cali-
fornia, Central Division:

Request for jury trial is made on behalf of the
aforenamed Alleged Bankrupt, Wilbert C. Ham-
ilton.

Dated: This 25th day of November, 1947.

/s/ SYLVAN Y. ALLEN,
Attorney for Alleged Bankrupt, Wilbert C. Ham-
ilton.

Filed Nov. 26, 1947. (Referee's Clerk.)

[Endorsed]: Filed Nov. 26, 1947. [52]

[Title of District Court and Cause.]

INTERROGATORIES ANNEXED TO ANSWER OF RESPONDENT WILBERT C. HAMILTON TO THE FIRST AMENDED INVOLUNTARY PETITION IN BANKRUPTCY

Each petitioning creditor is requested to answer under oath the following interrogatories which are annexed to the Answer of the respondent, Wilbert C. Hamilton, and in which answer the said respondent has requested that these interrogatories be separately answered under oath by each petitioning creditor:

1. When do you claim that the alleged copartnership between Wilbert C. Hamilton, Willard E. Brunson and Deon Bunch, trading under the name of Brunson and Bunch, originated?

2. When did you receive first notice of the existence of this copartnership with the personnel named in the first interrogatory and how did you receive this notice?

3. Was this notice in writing, and if so, please attach a copy of the said notice, and mark with an exhibit annexed to your answer?

4. Was the alleged partnership created by written articles of copartnership, signed and executed by the copartners, and if your answer is yes, please attach a copy of said articles of copartnership and

mark same an exhibit attached to your answer to this interrogatory? [46]

5. Do you claim to be a creditor of Wilbert C. Hamilton individually, and if your answer is yes, please state if the obligation is evidenced by written instrument or memorandum?

6. If your answer is by written instrument or memorandum, please attach a copy of said written instrument or memorandum to be marked as exhibits and annexed to your answer to this interrogatory.

7. If your claim is against the copartnership of Brunson and Bunch and not specifically Wilbert C. Hamilton, please state if the said claim is evidenced by written instrument or memorandum, and if so, please attach copies of said written instrument and/or memorandum, and mark the same exhibits annexed to your answer to this interrogatory.

8. Do you claim that John P. Strutzel and Anthony M. Cioffi, doing business as Aircraft Stamping Co. at the time of receiving the alleged payment of \$1,475.00 received the said payment as creditors of Wilbert C. Hamilton individually or as creditors of Brunson and Bunch, a copartnership?

9. Do you claim that the said payment of \$1,475.00 alleged to have been paid to the said John P. Strutzel and Anthony M. Cioffi, doing business as Aircraft Stamping Co., was made to them, by Wilbert C. Hamilton individually or by the partnership known as Brunson and Bunch?

10. Do you claim that George B. McClyman at the time of receiving the alleged payment of \$600.00 received the said payment as creditor of Wilbert C. Hamilton individually or as creditor of Brunson and Bunch, a copartnership?

11. Do you claim that the said payment of \$600.00 alleged to have been paid to the said George B. McClyman was made to him by Wilbert C. Hamilton individually or by the partnership known as Brunson and Bunch?

12. Do you claim that L. L. Farris & Co. at the time of receiving the alleged payment of \$2,100.00 received the said payment [47] as creditor of Wilbert C. Hamilton individually or as creditor of Brunson and Bunch, a copartnership?

13. Do you claim that the said payment of \$2,100.00 alleged to have been paid to the said L. L. Farris & Co. was made to it by Wilbert C. Hamilton individually or by the partnership known as Brunson and Bunch?

14. Do you claim that Elizabeth Brau at the time of receiving the alleged payment of \$89.28 received the said payment as creditor of Wilbert C. Hamilton individually or as creditor of Brunson and Bunch, a copartnership?

15. Do you claim that the said payment of \$89.28 alleged to have been paid to the said Elizabeth Brau was made to her by Wilbert C. Hamilton individually or by the partnership known as Brunson and Bunch?

16. Do you claim that Elizabeth Brau at the time of receiving the alleged payment of \$53.93 received the said payment as creditor of Wilbert C. Hamilton individually or as creditor of Brunson and Bunch, a copartnership?

17. Do you claim that the said payment of \$53.93 alleged to have been paid to the said Elizabeth Brau was made to her by Wilbert C. Hamilton individually or by the partnership known as Brunson and Bunch?

18. Do you claim that Fletcher Baughn at the time of receiving the alleged payment of \$12,000.00 received the said payment as creditor of Wilbert C. Hamilton individually or as creditor of Brunson and Bunch, a copartnership?

19. Do you claim that the said payment of \$12,000.00 alleged to have been paid to the said Fletcher Baughn was made to him by Wilbert C. Hamilton individually or by the partnership known as Brunson and Bunch?

20. Do you claim that Nellie Fath at the time of receiving the alleged payment of \$5,000.00 received the said payment as creditor [48] of Wilbert C. Hamilton individually or as creditor of Brunson and Bunch, a copartnership?

21. Do you claim that the said payment of \$5,000.00 alleged to have been paid to the said Nellie Fath was made to her by Wilbert C. Hamilton

individually or by the partnership known as Brunson and Bunch?

/s/ SYLVAN Y. ALLEN,
Attorney for Respondent,
Wilbert C. Hamilton. [49]

State of California,
County of Los Angeles—ss.

Wilbert C. Hamilton, being by me first duly sworn, deposes and says: that he is the Respondent in the above-entitled action; that he has read the foregoing Answer to First Amended Involuntary Petition in Bankruptcy, and Interrogatories With Request That They Be Answered Under Oath, i.e., By Each of the Petitioning Creditors Separately, and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

/s/ WILBERT C. HAMILTON.

Subscribed and sworn to before me this 25th day of November, 1947.

[Seal] /s/ VIRGINIA R. KERR,
Notary Public in and for said County and State of California.

[Title of District Court and Cause.]

ORDER TO ANSWER INTERROGATORIES

The petitioning creditors are ordered to answer the interrogatories annexed to the Answer of Respondent, Wilbert C. Hamilton, within 14 days from date of service.

/s/ HUGH DICKSON,
Referee.

Filed Nov. 26, 1947. (Referee's Clerk.)

[Endorsed]: Filed Nov. 26, 1947. [51]

[Title of District Court and Cause.]

ANSWER OF ELIZABETH BRAU TO INTERROGATORIES ATTACHED TO ANSWER TO FIRST AMENDED INVOLUNTARY PETITION IN BANKRUPTCY

To the Honorable Judges of the District Court of the United States, the Southern District of California, Central Division:

Comes now Elizabeth Brau, and in compliance with the order of the Honorable Hugh L. Dickson, Referee in Bankruptcy, made on the 26th day of November, 1947, herein presents her answer to said interrogatories:

State of California,
County of Los Angeles—ss.

Elizabeth Brau, being first duly sworn, deposes and on her oath says: That she is one and the

same person as the Elizabeth Brau, a petitioning creditor in the above-entitled and numbered action; that she herewith answers the interrogatories attached to the answer to First Amended Involuntary Petition on file herein, as follows, to wit:

1. On or about the 15th day of December, 1946, at which time, and at numerous times thereafter, Wilbert C. Hamilton advised Affiant and various and sundry other persons that any and all monies to be advanced said co-partnership were to be advanced and secured by and through the said Wilbert C. Hamilton; that the said statements were orally made by the said Wilbert C. Hamilton to Affiant and to various and sundry other persons on or about the said 15th day of December, 1946, and many times subsequent thereto.

2. On or about the 2nd day of January, 1947, orally, from one G. N. [56] Williams, at the special instance and request of the said Wilbert C. Hamilton.

3. No.

4. The said co-partnership was created by an oral understanding and agreement by and between each of the partners composing said co-partnership, namely, Wilbert C. Hamilton, Willard E. Brunson, and Deon Bunch; and that subsequent thereto, the exact date thereof being at this time unknown to Affiant, the said co-partnership was evidenced by written articles of co-partnership, duly executed and signed by each of the said co-partners; that

the said written articles of co-partnership are in the possession of and under the control of the said Wilbert C. Hamilton, and your Affiant is therefore unable to attach the same as an exhibit to these answers to interrogatories.

5. Yes. Affiant's obligation is evidenced both by a written memorandum and an oral understanding, in that at the special instance and request of the said Wilbert C. Hamilton, the said G. N. Williams represented to Affiant that the said Wilbert C. Hamilton was well acquainted with and personally knew the said Willard E. Brunson and the said Deon Bunch; and that Affiant's money was advanced to the said co-partnership and to the said Wilbert C. Hamilton, individually, in reliance upon the truth of said representations; that subsequent thereto, and on or about the first day of April, 1947, the said Wilbert C. Hamilton orally represented to Affiant that he, the said Hamilton, had in his possession good and valuable and sufficient securities to insure Affiant's money against loss; that in truth and in fact, said securities were at all times valueless and that the said Hamilton knew, or by the exercise of ordinary, prudent, and reasonable caution, should have known, that the said securities were in fact valueless and worthless; that Affiant further relied upon the said representations, and relying thereon, permitted Affiant's money to remain with the said co-partnership and the said Hamilton for the purposes for which said money was originally so advanced by Affiant; that

Affiant's said money was so advanced as aforesaid for the specific purpose of the purchase and sale of commodities and for no other purpose, while in truth and in fact the said Wilbert C. Hamilton and the said co-partnership deliberately and knowingly used and misapplied Affiant's said money to and for purposes wholly foreign to the purposes [57] as aforesaid.

6. Said written instrument is evidenced by a photostatic copy thereof, attached hereto, and marked "Exhibit A."

7. Your Affiant's claim is against the co-partnership known as Brunson and Bunch, and composed of Wilbert C. Hamilton, Willard E. Brunson, and Deon Bunch, and against Wilbert C. Hamilton, individually.

8. Both Wilbert C. Hamilton, individually, and the co-partnership known as Brunson and Bunch.

9. Both Wilbert C. Hamilton, individually, and the co-partnership known as Brunson and Bunch.

10. Both Wilbert C. Hamilton, individually, and the co-partnership known as Brunson and Bunch.

11. Both Wilbert C. Hamilton, individually, and the co-partnership known as Brunson and Bunch.

12. The co-partnership known as Brunson and Bunch.

13. The co-partnership known as Brunson and Bunch.

14. Both Wilbert C. Hamilton, individually, and the co-partnership known as Brunson and Bunch.

15. Both Wilbert C. Hamilton, individually, and

the co-partnership known as Brunson and Bunch.

16. Both Wilbert C. Hamilton, individually, and the co-partnership known as Brunson and Bunch.

17. Both Wilbert C. Hamilton, individually, and the co-partnership known as Brunson and Bunch.

18. Both Wilbert C. Hamilton, individually, and the co-partnership known as Brunson and Bunch.

19. Both Wilbert C. Hamilton, individually, and the co-partnership known as Brunson and Bunch.

20. Both Wilbert C. Hamilton, individually, and the co-partnership known as Brunson and Bunch.

21. Both Wilbert C. Hamilton, individually, and the co-partnership known as Brunson and Bunch.

/s/ ELISABETH BRAU,
Affiant. [58]

Subscribed and sworn to before me this 1st day of December, 1947.

[Seal] G. N. WILLIAMS,
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires Nov. 15, 1951.

Filed Dec. 10, 1947. (Referee's Clerk.)

[Endorsed]: Filed Dec. 12, 1947. [59]

[Title of District Court and Cause.]

ANSWER OF ELIZABETH SPENCER SAU-
ERS TO INTERROGATORIES ATTACHED
TO ANSWER TO FIRST AMENDED IN-
VOLUNTARY PETITION IN BANK-
RUPTCY

To the Honorable Judges of the District Court of
the United States, the Southern District of
California, Central Division:

Comes now Elizabeth Spencer Sauers, and in
compliance with the order of the Honorable Hugh
L. Dickson, Referee in Bankruptcy, made on the
26th day of November, 1947, herein presents her
answer to said interrogatories:

State of California,
County of Los Angeles—ss.

Elizabeth Spencer Sauers, being first duly sworn,
deposes and on her oath says: That she is one and
the same person as the Elizabeth Spencer Sauers,
a petitioning creditor in the above-entitled and
numbered action; that she herewith answers the
interrogatories attached to the answer to First
Amended Involuntary Petition on file herein, as
follows, to wit:

1. On or about the 15th day of December, 1946,
at which time, and at numerous times thereafter,
Wilbert C. Hamilton advised Affiant and various
and sundry other persons that any and all monies
to be advanced said co-partnership were to be

advanced and secured by and through the said Wilbert C. Hamilton; that the said statements were orally made by the said Wilbert C. Hamilton to Affiant and to various and sundry other persons on or about the said 15th day of December, 1946, and many times subsequent thereto.

2. On or about the 2nd day of January, 1947, orally, from one G. N. [60] Williams, at the special instance and request of the said Wilbert C. Hamilton.

3. No.

4. The said co-partnership was created by an oral understanding and agreement by and between each of the partners composing said co-partnership, namely, Wilbert C. Hamilton, Willard E. Brunson, and Deon Bunch; and that subsequently thereto, the exact date thereof being at this time unknown to Affiant, the said co-partnership was evidenced by written articles of co-partnership, duly executed and signed by each of the said co-partners; that the said written articles of co-partnership are in the possession of and under the control of the said Wilbert C. Hamilton, and your Affiant is therefore unable to attach the same as an exhibit to these interrogatories.

5. Yes. Affiant's obligation is evidenced both by a written memorandum and an oral understanding, in that at the special instance and request of the said Wilbert C. Hamilton, the said G. N. Williams represented to Affiant that the said Wil-

bert C. Hamilton was well acquainted with and personally knew the said Willard E. Brunson and the said Deon Bunch; and that Affiant's money was advanced to the said co-partnership and to the said Wilbert C. Hamilton, individually, in reliance upon the truth of said representations; that subsequent thereto, and on or about the first day of April, 1947, the said Wilbert C. Hamilton orally represented to Affiant that he, the said Hamilton, had in his possession good and valuable and sufficient securities to insure Affiant's money against loss; that in truth and in fact, said securities were at all times worthless and that the said Hamilton knew, or by the exercise of ordinary, prudent, and reasonable caution, should have known, that the said securities were in fact valueless and worthless; that Affiant further relied upon the said representations, and relying thereon, permitted Affiant's money to remain with the said co-partnership and the said Hamilton for the purposes for which said money was originally so advanced by Affiant; that Affiant's said money was so advanced as aforesaid for the specific purpose of the purchase and sale of commodities and for no other purpose, while in truth and in fact the said Wilbert C. Hamilton and the said co-partnership deliberately and knowingly used the misapplied Affiant's said money to and for purposes wholly foreign to the purposes [61] as aforesaid.

6. Said written instrument is evidenced by a

photostatic copy thereof, attached hereto, and marked "Exhibit A."

7. Your Affiant's claim is against the co-partnership known as Brunson and Bunch, and composed of Wilbert C. Hamilton, Willard E. Brunson, and Deon Bunch, and against Wilbert C. Hamilton, individually.

8. Both Wilbert C. Hamilton, individually, and the co-partnership known as Brunson and Bunch.

9. Both Wilbert C. Hamilton, individually, and the co-partnership known as Brunson and Bunch.

10. Both Wilbert C. Hamilton, individually, and the co-partnership known as Brunson and Bunch.

11. Both Wilbert C. Hamilton, individually, and the co-partnership known as Brunson and Bunch.

12. The co-partnership known as Brunson and Bunch.

13. The co-partnership known as Brunson and Bunch.

14. Both Wilbert C. Hamilton, individually, and the co-partnership known as Brunson and Bunch.

15. Both Wilbert C. Hamilton, individually, and the co-partnership known as Brunson and Bunch.

16. Both Wilbert C. Hamilton, individually, and the co-partnership known as Brunson and Bunch.

17. Both Wilbert C. Hamilton, individually, and the co-partnership known as Brunson and Bunch.

18. Both Wilbert C. Hamilton, individually, and the co-partnership known as Brunson and Bunch.

19. Both Wilbert C. Hamilton, individually, and the co-partnership known as Brunson and Bunch.

20. Both Wilbert C. Hamilton, individually, and the co-partnership known as Brunson and Bunch.

21. Both Wilbert C. Hamilton, individually, and the co-partnership known as Brunson and Bunch.

/s/ ELIZABETH SPENCER

SAUERS,

Affiant. [62]

Subscribed and sworn to before me this 13th day of December, 1947.

[Seal] /s/ G. N. WILLIAMS,
Notary Public in and for County of Los Angeles,
State of California.

My Commission Expires Nov. 15, 1951.

Filed Dec. 15, 1947. (Referee's Clerk.)

[Endorsed]: Filed Dec. 19, 1947. [63]

RESPONDENT'S EXHIBIT B

March 28, 1947.

Mr. G. N. Williams
639 South Spring Street
Los Angeles 14

Dear Sir:

I hand you herewith as my attorney and agent the sum of \$2,500.00, which I hereby authorize you to

invest for me and particularly to use this money in joint ventures with Brunson & Bunch, a copartnership, commodity brokers, in the financing of purchases and sales of commodities.

I deposit with you the aforementioned sum of money for a period of six months from the date hereof, and for subsequent periods of six months each, unless and until I serve upon you 60 days' written notice for the return of this money to me. This written notice, if any, I shall serve upon you 60 days prior to the ending of any six-month period. In the event that it becomes possible for this money to be returned to me prior to the expiration of such a notice, if any, I understand that the money will be returned to me. Otherwise the return shall be made at the end of the period as herein specified.

I deposit this money with you under and upon the following understanding: (1) that you as my attorney and agent will in turn transfer this money to Brunson & Bunch for the purpose of investing the same in the purchase and sale of commodities, (2) that I will be paid monthly on or before the 5th day of the following month 2% of the amount of this deposit, and that at the end of each quarter 40% of the profits of all transactions in which this money is used shall be paid me, deducting therefrom the 2% theretofor paid during such quarter. It is understood that the payments of 2% shall be advances upon profits to be earned and to be offset against the total of the profits earned during such quarter.

Your acknowledgment on a duplicate copy of this letter shall be considered the terms and conditions under which this money is placed with you for my benefit.

Very truly yours,

/s/ ELIZABETH SPENCER

SAUERS,

1034 Kendall Dr.,

San Gabriel, Calif.

G. H. Williams

March 28, 1947.

Received the sum of \$2500.00 this 28 day of March, 1947, which I agree to use in accordance with the above terms and conditions and understandings.

/s/ G. N. WILLIAMS.

[Clerk's exhibit identification attached.]

[Entered]: June 30, 1948.

[Title of District Court and Cause.]

ANSWER OF WILLIS N. URIE TO INTER-
ROGATORIES ATTACHED TO ANSWER
TO FIRST AMENDED INVOLUNTARY
PETITION IN BANKRUPTCY

To the Honorable Judges of the District Court of
the United States, the Southern District of
California, Central Division:

Comes now Willis N. Urie, and in compliance with
the order of the Honorable Hugh L. Dickson, Ref-

eree in Bankruptcy, made on the 26th day of November, 1947, herein presents his answer to said interrogatories:

State of California,
County of Los Angeles—ss.

Willis N. Urie, being first duly sworn, deposes, and on his oath says: That he is one and the same person as the Willis N. Urie, a petitioning creditor in the above-entitled and numbered action; that he herewith answers the interrogatories attached to the answer to First Amended Involuntary Petition on file herein, as follows, to wit:

1. On or about the 1st day of March, 1947, at which time, and at numerous times thereafter, Wilbert C. Hamilton advised Affiant and various and sundry other persons that any and all monies to be advanced said co-partnership were to be advanced and secured by and through the said Wilbert C. Hamilton; that the said statements were orally made by the said Wilbert C. Hamilton to Affiant and to various and sundry other persons on or about the said 1st day of March, 1947, and many times subsequent thereto.

2. On or about the 15th day of March, 1947, directly and orally from the [66] said Wilbert C. Hamilton.

3. No.

4. The said co-partnership was created by an oral understanding and agreement by and between

each of the partners composing said co-partnership, namely, Wilbert C. Hamilton, Willard E. Brunson, and Deon Bunch; and that subsequent thereto, the exact date thereof being at this time unknown to Affiant, the said co-partnership was evidenced by written articles of co-partnership, duly executed and signed by each of the said co-partners; that the said written articles of co-partnership are in the possession of and under the control of the said Wilbert C. Hamilton, and your Affiant is therefore unable to attach the same as an exhibit to these answers to interrogatories.

5. Yes. Affiant's obligation is evidence both by a written memorandum and an oral understanding, in that the said Wilbert C. Hamilton represented to Affiant that the said Wilbert C. Hamilton was well acquainted with and personally knew the said Willard E. Brunson and the said Deon Bunch; and that Affiant's money was advanced to the said co-partnership and to the said Wilbert C. Hamilton, individually, in reliance upon the truth of said representations; that subsequent thereto, and on or about the first day of April, 1947, the said Wilbert C. Hamilton orally represented to Affiant that he, the said Hamilton, had in his possession good and valuable and sufficient securities to insure Affiant's money against loss; that in truth and in fact, said securities were at all times valueless and that the said Hamilton knew, or by the exercise of ordinary, prudent, and reasonable caution, should have known, that the said securities were in fact

valueless and worthless; that Affiant further relied upon the said representations, and relying thereon, permitted Affiant's money to remain with the said co-partnership and the said Hamilton for the purposes for which said money was originally so advanced by Affiant; that Affiant's said money was so advanced as aforesaid for the specific purpose of the purchase and sale of commodities and for no other purpose, while in truth and in fact the said Wilbert C. Hamilton and the said co-partnership deliberately and knowingly used and misapplied Affiant's said money to and for purposes wholly foreign to the purposes as aforesaid. [67]

6. Said written instrument is evidenced by a photostatic copy thereof, attached hereto, and marked "Exhibit A."

7. Your Affiant's claim is against the co-partnership known as Brunson and Bunch, and composed of Wilbert C. Hamilton, Willard E. Brunson, and Deon Bunch, and against Wilbert C. Hamilton, individually.

8. Both Wilbert C. Hamilton, individually, and the co-partnership known as Brunson and Bunch.

9. Both Wilbert C. Hamilton, individually, and the co-partnership known as Brunson and Bunch.

10. Both Wilbert C. Hamilton, individually, and the co-partnership known as Brunson and Bunch.

11. Both Wilbert C. Hamilton, individually, and the co-partnership known as Brunson and Bunch.

12. The co-partnership known as Brunson and Bunch.

13. The co-partnership known as Brunson and Bunch.

14. Both Wilbert C. Hamilton, individually, and the co-partnership known as Brunson and Bunch.

15. Both Wilbert C. Hamilton, individually, and the co-partnership known as Brunson and Bunch.

16. Both Wilbert C. Hamilton, individually, and the co-partnership known as Brunson and Bunch.

17. Both Wilbert C. Hamilton, individually, and the co-partnership known as Brunson and Bunch.

18. Both Wilbert C. Hamilton, individually, and the co-partnership known as Brunson and Bunch.

19. Both Wilbert C. Hamilton, individually, and the co-partnership known as Brunson and Bunch.

20. Both Wilbert C. Hamilton, individually, and the co-partnership known as Brunson and Bunch.

21. Both Wilbert C. Hamilton, individually, and the co-partnership known as Brunson and Bunch.

/s/ WILLIS N. URIE,

Affiant. [68]

Subscribed and sworn to before me this 11th day of December, 1947.

[Seal] /s/ LEONARD W. AASLAND,
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires Feb. 13, 1951.

Filed Dec. 15, 1947.

[Endorsed]: Filed Dec. 19, 1947. [69]

EXHIBIT A

Date: March 28, 1947.

Mr. Wilbert C. Hamilton
639 South Spring Street
Suite 506
Los Angeles 14

Dear Sir:

I hand you herewith as my agent the sum of \$5000.00 which you are authorized to invest for me and particularly to use the same in joint ventures with Brunson & Bunch, a copartnership, in the financing of various commodities.

You are to have this money for a period of six months from date, and thereafter until given sixty days' notice in writing for the return of the same.

This money is deposited with you with the understanding that the money deposited with you is to draw 40% of the profits of all transactions of a joint

venture on which the money is used, and that I am to have a guarantee of earnings from the joint venture of 2% per month minimum, payable on or before the 5th day of each and every month commencing May 5, 1947.

Your acknowledgment on a duplicate copy of this letter shall be considered the terms and conditions under which this money is placed with you for our benefit.

Very sincerely yours,

/s/ WILLIS N. URIE,

Address: 1454 Lincoln Blvd., Santa Monica, Calif,

Phone: Santa Monica 52257.

encl. 1

Received the sum of \$5000.00, which is to be used in accordance with the above terms and conditions.

/s/ WILBERT C. HAMILTON.

[Title of District Court and Cause.]

ANSWER OF GEORGE B. McClyman TO INTERROGATORIES ATTACHED TO ANSWER TO FIRST AMENDED INVOLUNTARY PETITION IN BANKRUPTCY

To the Honorable Judges of the District Court of the United States, the Southern District of California, Central Division:

Comes now George B. McClyman, and in compliance with the order of the Honorable Hugh L. Dickson, Referee in Bankruptcy, made on the 26th day

of November, 1947, herein presents *her* answer to said interrogatories:

State of California,
County of Los Angeles—ss.

George B. McClyman, being first duly sworn, deposes and on his oath says: That he is one and the same person as the George B. McClyman, a petitioning creditor in the above-entitled and numbered action; that he herewith answers the interrogatories attached to the answer to First Amended Involuntary Petition on file herein, as follows, to wit:

1. On or about the 2nd day of January, 1947, at which time, and at numerous times thereafter, Wilbert C. Hamilton advised Affiant and various and sundry other persons that any and all monies to be advanced said co-partnership were to be advanced and secured by and through the said Wilbert C. Hamilton; that the said statements were orally made by the said Wilbert C. Hamilton to Affiant and to various and sundry other persons on or about the 2nd day of January, 1947, and many times subsequent thereto.

2. On or about the 2nd day of January, 1947, orally, directly from the [71] said Wilbert C. Hamilton.

3. No.

4. The said co-partnership was created by an oral understanding and agreement by and between each of the partners composing said co-partnership,

namely, Wilbert C. Hamilton, Willard E. Brunson, and Deon Bunch, and that subsequent thereto, the exact date thereof being at this time unknown to Affiant, the said co-partnership was evidenced by written articles of co-partnership, duly executed and signed by each of the said co-partners; that the said written articles of co-partnership are in the possession of and under the control of the said Wilbert C. Hamilton, and your Affiant is therefore unable to attach the same as an exhibit to these answers to interrogatories.

5. Yes. Affiant's obligation is evidenced by both written memorandums and an oral understanding, in that the said Wilbert C. Hamilton represented to Affiant that the said Hamilton was well acquainted with and personally knew the said Willard E. Brunson, and the said Deon Bunch, and that Affiant's money was advanced to the said co-partnership and to the said Wilbert C. Hamilton, individually, in reliance upon the truth of said representations; that subsequent thereto, and on or about the first day of April, 1947, the said Wilbert C. Hamilton, orally, represented to Affiant that he, the said Hamilton, had in his possession good and valuable and sufficient securities to insure Affiant's money against loss; that in truth and in fact, said securities were at all times valueless and that the said Hamilton knew, or by the exercise of ordinary, prudent, and reasonable caution, should have known, that the said securities were in fact valueless and worthless; that Affiant further relied upon the said representation, and relying thereon, permitted Affi-

ant's money to remain with the said co-partnership and the said Hamilton for the purposes for which said money was originally so advanced by Affiant; that Affiant's said money was so advanced as aforesaid for the specific purpose of the purchase and sale of commodities and for no other purpose, while in truth and in fact the said Wilbert C. Hamilton and the said co-partnership deliberately and knowingly used and misapplied Affiant's said money to and for purposes wholly foreign to the purposes as aforesaid. [72]

6. Said written instruments are evidenced by photostatic copies thereof, attached hereto, and marked "Exhibit A."

7. Your Affiant's claim is against the co-partnership known as Brunson and Bunch, and composed of Wilbert C. Hamilton, Willard E. Brunson, and Deon Bunch, and against Wilbert C. Hamilton, individually.

8. Both Wilbert C. Hamilton, individually, and the co-partnership known as Brunson and Bunch.

9. Both Wilbert C. Hamilton, individually, and the co-partnership known as Brunson and Bunch.

10. Both Wilbert C. Hamilton, individually, and the co-partnership known as Brunson and Bunch.

11. Both Wilbert C. Hamilton, individually, and the co-partnership known as Brunson and Bunch.

12. The co-partnership known as Brunson and Bunch.

13. The co-partnership known as Brunson and Bunch.

14. Both Wilbert C. Hamilton, individually, and the co-partnership known as Brunson and Bunch.

15. Both Wilbert C. Hamilton, individually, and the co-partnership known as Brunson and Bunch.

16. Both Wilbert C. Hamilton, individually, and the co-partnership known as Brunson and Bunch.

17. Both Wilbert C. Hamilton, individually, and the co-partnership known as Brunson and Bunch.

18. Both Wilbert C. Hamilton, individually, and the co-partnership known as Brunson and Bunch.

19. Both Wilbert C. Hamilton, individually, and the co-partnership known as Brunson and Bunch.

20. Both Wilbert C. Hamilton, individually, and the co-partnership known as Brunson and Bunch.

21. Both Wilbert C. Hamilton, individually, and the co-partnership known as Brunson and Bunch.

/s/ GEORGE B. McClyman,
Affiant. [73]

Subscribed and sworn to before me this 11 day of December, 1947.

[Seal] /s/ H. H. SLATE,
Notary Public in and for Said
County and State.

Filed Dec. 15, 1947. (Referee's Clerk.)

[Endorsed]: Filed Dec. 19, 1947. [74]

Wilbert C. Hamilton
Attorney at Law
639 South Spring Street
Los Angeles 14
TUcker 7178

January 9, 1947.

Mr. George B. McClyman
639 South Spring Street
Suite 1115
Los Angeles 14, California

Dear Mr. McClyman:

This will acknowledge receipt of the sum of \$1,000 by check made payable to myself. It is understood that I am to deposit this check in the Investors' Trust in the Canadian Bank of Commerce, of which Trust I am the sole Trustee. This money is to be used in financing brokers, etc., on contracts for wire, nails, plaster, various building materials and other commodities. Out of the net profits the brokers receive 50%, while I as Trustee receive 10%, and 40% of the profits goes to the Trust. This 40% is divided in accordance with the interest of each person in the Trust.

Upon serving written notice upon me of your demand for your principal, the same will be returned to you sixty days after said demand is received. An accounting will be made monthly to the investors, showing the amount invested, the earnings of the Trust, the amount collected, and the amount outstanding.

I trust that we will be able to make you a very substantial profit upon these deals. I reserve the right to return your full investment at any time I see fit to do so. The same will not otherwise be returned except upon 60 days' notice. I trust this is your understanding. If not, please let me know immediately.

Very sincerely yours,

/s/ WILBERT C. HAMILTON.

WCH:vk

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

The above-entitled matter came on regularly for hearing in Department 5 of the above-entitled Court, Judge Leon R. Yankwich presiding, the formal hearings taking place on these dates, to wit: June 29, 1948; June 30, 1948; July 1, 1948; September 7, 1948; September 8, 1948; September 9, 1948. Glenn A. Lane and H. H. Slate, attorneys at law, appeared on behalf of the petitioning creditors; Sylvan Y. Allen, J. D. Willard and Ernest R. Utley, attorneys at law, appeared on behalf of the respondent, Wilbert C. Hamilton; and Wyman G. Reynolds, attorney at law, appeared on behalf of Willard E. Brunson and Deon Bunch, a co-partnership, doing business as Brunson & Bunch.

I.

Evidence, both oral and documentary, was introduced on behalf of the petitioning creditors and evidence, oral and documentary, was introduced in contravention thereto on behalf of the respondent, Wilbert C. Hamilton.

II.

The matter having been submitted to the Court for its consideration and [124] decision and the Court being fully advised in the premises now finds the facts as follows:

a. That it is not true as alleged in the First Amended Involuntary Petition "that Wilbert C. Hamilton of 1067 West 83rd Street, City and County of Los Angeles, State of California, was a co-partner with Willard E. Brunson and Deon Bunch in the operation and conduct of a business trading under the firm name of Brunson & Bunch; and that it is true as alleged by the respondent, Wilbert C. Hamilton, in his answer, that the said Wilbert C. Hamilton is not a co-partner of Willard E. Brunson and Deon Bunch in the firm of Brunson & Bunch; and that the said Wilbert C. Hamilton was never associated with Willard E. Brunson and Deon Bunch in any co-partnership relationship of any kind or nature whatsoever.

b. It is true that the said respondent, Wilbert C. Hamilton, has had his principal place of business at 639 South Spring Street, City and County of Los Angeles, State of California, within the above judicial district during the six (6) months imme-

diately preceding the filing of the original Petition.

c. It is true that the said Wilbert C. Hamilton, respondent, is not a wage earner or a farmer.

d. It is not true that the petitioners are creditors of the respondent, Wilbert C. Hamilton.

e. The Court finds that the petitioner, George B. McClyman, did not lend to the respondent, Wilbert C. Hamilton, the sum of Twenty Thousand Three Hundred Fifty-Nine Dollars (\$20,359.00) or any amount whatsoever during the nine (9) months period immediately preceding the filing of the petition, and the Court finds further that the respondent, Wilbert C. Hamilton, is not indebted to the petitioner, George B. McClyman, in any amount whatsoever.

f. The Court finds that the petitioner, Elizabeth Spencer Sauers, did not lend to the respondent, Wilbert C. Hamilton, the sum of Four Thousand Seven Hundred One and 52/100 Dollars (\$4,701.52) or any amount whatsoever during the nine (9) months period immediately preceding the filing of the petition, and the Court finds further that the respondent, Wilbert C. Hamilton, is not indebted to the petitioner, Elizabeth Spencer Sauers, in any amount whatsoever. [125]

g. The Court finds that the petitioner, Elizabeth Brau, did not lend to the respondent, Wilbert C. Hamilton, the sum of Eighteen Thousand Thirty and 90/100 Dollars (\$18,030.90) or any amount whatsoever during the nine (9) months period immediately preceding the filing of the petition, and

the Court finds further that the respondent, Wilbert C. Hamilton, is not indebted to the petitioner, Elizabeth Brau, in any amount whatsoever.

h. The Court finds that the petitioner, Willis N. Urie, did not lend to the respondent, Wilbert C. Hamilton, the sum of Five Thousand Dollars (\$5,000.00) or any amount whatsoever during the nine (9) months period immediately preceding the filing of the petition, and the Court finds further that the respondent, Wilbert C. Hamilton, is not indebted to the petitioner, Willis N. Urie, in any amount whatsoever.

i. It is not true that the respondent, Wilbert C. Hamilton, committed any of the acts of bankruptcy which are alleged and set out in the Amended Complaint. The Court finds that the respondent, Wilbert C. Hamilton, is in no way responsible for the actions of the members of the co-partnership of Brunson & Bunch, to wit: Willard E. Brunson and Deon Bunch, in regards to the commission by the said co-partners of any of the acts of bankruptcy alleged in the Amended Complaint. The Court makes no specific finding at this time as to whether any of the acts of bankruptcy set out in the Amended Complaint were actually committed by the said co-partners. That question was not an issue in this hearing.

j. It is not true that at the time of the alleged commissions of acts of bankruptcy by the true co-partners, Willard E. Brunson and Deon Bunch, that the respondent, Wilbert C. Hamilton, was in-

solvent. The Court makes no finding at this time as to the solvency and the financial condition of the co-partnership and the true co-partners, Willard E. Brunson and Deon Bunch, of the partnership known as Brunson & Bunch at the times when the alleged acts of bankruptcy were purportedly committed by the co-partnership of Brunson & Bunch. Those matters were not of issue at the present hearing.

k. The Court finds that the dealings between the respondent, Wilbert C. Hamilton, and the partnership known as Brunson & Bunch consisting of the co-partners [126] as hereinbefore set out were governed by agreements entered into by the respondent, Wilbert C. Hamilton, and the partnership, whereby, in consideration of the respondent's furnishing money belonging to his clients or to trusts over which he had control, a definite percentage of the profits were promised. Each transaction was the subject of a special agreement. No other representations were made by the respondent, Wilbert C. Hamilton, to any of the clients. Nor was any obligation assumed by him for the successful culmination of the investment or the payment of the profits guaranteed. The clients knew that the profits to be derived from the enterprise were to be divided, so as to allow the respondent, Wilbert C. Hamilton, a profit for acting as the intermediary between them and the partnership. The accounts of the clients were kept in the books of the partnership, and the profits which the respondent, Wilbert

C. Hamilton, received—10 per cent—were separate and distinct from the profits of the partnership. They were so entered upon whatever books he kept. No control was exercised by him over the conduct of the affairs of the partnership. All that the respondent, Wilbert C. Hamilton, had was the promise of a certain percentage of the profits, the amount of which depended on whether the money invested belonged to a trust in which he had an interest, or belonged entirely to clients.

1. The Court finds that the relationship between the respondent, Wilbert C. Hamilton, and the partnership of Brunson & Bunch had none of the indicia of a partnership; that at most there existed a series of separate dealings of the joint venture type.

m. The Court finds that the respondent, Wilbert C. Hamilton, committed no act or acts which would show acts of estoppel warranting the Court in declaring the respondent, Wilbert C. Hamilton, to be a general partner.

n. The Court finds as to the respondent, Wilbert C. Hamilton, individually, that the evidence fails to show his insolvency, individually, as defined by the Bankruptcy Act of 1938.

o. The Court finds that the petitioning creditors do not have claims fixed as to liability or liquidated as to amount as to the respondent, Wilbert C. Hamilton. [127]

Conclusions of Law

As conclusions of law from the foregoing findings of fact, the Court concludes:

I.

That the respondent, Wilbert C. Hamilton, is not a member of the co-partnership of the firm name of Brunson & Bunch and should not be joined with Willard E. Brunson and Deon Bunch in a bankruptcy proceeding against the said co-partnership.

II.

That the respondent, Wilbert C. Hamilton, is not indebted in any way to any of the petitioning creditors nor to any creditors of Brunson & Bunch, a co-partnership, by reason of any partnership status of said respondent in said partnership.

III.

That the respondent, Wilbert C. Hamilton, did not commit any acts of bankruptcy nor did he commit any acts which would subject him to proceeding under the United States Bankruptcy Act.

IV.

That the respondent, Wilbert C. Hamilton, is not insolvent as defined by the Bankruptcy Act of 1938.

V.

That the petitioning creditors and each of them shall take nothing by their involuntary petition in Bankruptcy against the respondent, Wilbert C. Hamilton, either as an alleged member of the partnership of Brunson & Bunch or individually.

VI.

That said petitioning creditors do not qualify as to the respondent, Wilbert C. Hamilton, as creditors having claims fixed as to liability and liquidated as to amount as provided in Section 59B of the bankruptcy act.

VII.

That the said involuntary petition in Bankruptcy should, on the merits, be dismissed as to the respondent, Wilbert C. Hamilton, both as an alleged member of the [128] partnership of Brunson & Bunch and individually.

VIII.

That the respondent, Wilbert C. Hamilton, is entitled to a judgment against the petitioning creditors for the respondent's costs necessarily incurred and expended.

Done in Open Court This 30th Day of September, 1948.

/s/ LEON R. YANKWICH,
Judge of the District Court of the United States,
Southern District of California, Central Division. [129]

Received copy of the within Proposed Finding of Facts and Admissions of Law this 27th day of September, 1948.

/s/ H. H. SLATE.

[Endorsed]: Filed Sept. 30, 1948. [130]

In the District Court of the United States, Southern District of California, Central Division

No. 45310-Y In Bankruptcy

In the Matter of:

WILBERT C. HAMILTON, Individually, and the Partnership Known as BRUNSON & BUNCH, Composed of WILLARD E. BRUNSON and DEON BUNCH, and the Said WILBERT C. HAMILTON,

Alleged Bankrupts.

JUDGMENT

This cause having been brought on for trial before the honorable Leon R. Yankwich, Judge of the above-entitled Court, on the 29th day of June, 1948, and the jury having been duly waived, and the trial having *proceeding* to a conclusion on the 9th day of September, 1948, wherein Glenn A. Lane and H. H. Slate, attorneys at law, appeared on behalf of the petitioning creditors; Sylvan Y. Allen, J. D. Willard, and Ernest R. Uteley, attorneys at law, appeared on behalf of the respondent, Wilbert C. Hamilton, and Wyman G. Reynolds, attorney at law, appeared on behalf of Willard E. Brunson and Deon Bunch, a co-partnership, doing business as Brunson & Bunch, and the Court having filed herein its Findings of Fact and Conclusions of Law, and having directed that judgment be entered in accordance therewith:

Now, Therefore, by reason of the law and the findings aforesaid:

It Is Hereby Ordered, Adjudged and Decreed:

I.

That on the merits the respondent, Wilbert C. Hamilton, have judgment in his favor and the petitioners take nothing by their involuntary petition in bankruptcy against the respondent either as a member of the partnership of Brunson & Bunch or individually.

II.

That the said involuntary petition in bankruptcy be and the same is [131] hereby dismissed as to the respondent, Wilbert C. Hamilton, both as a member of the partnership of Brunson & Bunch and individually.

III.

The respondent shall have judgment against the petitioners for the respondent's costs herein taxed at \$302.78.

Dated this 30th day of September, 1948.

/s/ LEON R. YANKWICH,
Judge of the District Court of the United States,
Southern District of California, Central Division.

Judgment entered Sept. 30, 1948.

Docketed Sept. 30, 1948, Book 53, Page 72. [132]

Received copy of the within Proposed Judgment this 27th day of September, 1948.

/s/ H. H. SLATE.

[Endorsed]: Filed Sept. 30, 1948. [133]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL AND TO VACATE
AND SET ASIDE JUDGMENT

Come now the petitioning creditors in the above-entitled matter and move for a new trial of the above-entitled cause, heretofore tried before the Honorable Leon R. Yankwich, Judge of the above-entitled Court, on the 29th day of June, 1948, and concluded on the 9th day of September, 1948, and move the above-entitled Court to vacate and set aside the judgment heretofore made and entered in the above-entitled cause on the 30th day of September, 1948, upon the following grounds, which grounds are hereby relied upon by the petitioning creditors in making this motion for new trial and motion to vacate and set aside said judgment, to wit:

(1) Irregularity in the proceedings of the court, by which the petitioning creditors were prevented from having a fair trial;

(2) Irregularity in the orders of the court, by which the petitioning creditors were prevented from having a fair trial;

(3) Irregularity in the proceedings of the court, and abuse of discretion by the court, by which the petitioning creditors were prevented from having a fair trial; [134]

(4) Irregularity in the proceedings of the adverse party, namely, Wilbert C. Hamilton, and his

attorneys, by which the petitioning creditors were prevented from having a fair trial;

(5) Accident and/or surprise, which ordinary prudence could not have guarded against by which the petitioning creditors were prevented from having a fair trial;

(6) Newly-discovered evidence, material for the petitioning creditors, which could not with reasonable diligence have been discovered and produced at the trial by the petitioning creditors;

(7) Insufficiency of the evidence to justify the judgment of the Court, and insufficiency of the evidence to justify the orders and decisions of the Court.

(8) Errors in law occurring at the trial.

* * * *

That the particular errors in law occurring at the trial and which are relied upon by the petitioning creditors in making this motion for new trial are as follows:

(A) That order and ruling by the court that the official court reporter of said Court was the court's own reporter, and that the Court need not and would not have the said reporter take down or report the Court's remarks which were directed to counsel for the petitioning creditors and to the petitioning creditors, and to the act and ruling and order of the Court, instructing the said reporter not to take down the remarks of the Court made

during a portion of the trial of said cause, and the act and order and instruction of the Court determining that only certain portions of the proceeding would be reported by the official reporter, and that other portions of the proceeding, particularly the remarks of the Court directed to counsel for petitioning creditors, and directed to the petitioning creditors should not be taken down and reported by the official court reporter.

(B) That order of the court denying the motion of the attorneys for petitioning creditors, whereby the said attorneys for petitioning creditors moved the Court to instruct the official court reporter of the above-entitled [135] Court to take down all of the proceedings that transpired during the trial of said cause, and particularly the Court's remarks made during the trial of said cause, and which remarks were directed to the petitioning creditors and to the counsel for petitioning creditors.

(C) That ruling and order of the Court, repeatedly made and reiterated during the trial of said cause, that the only issue before the Court on the hearing and trial of said matter and cause was the one and sole issue of whether or not the respondent, Wilbert C. Hamilton, was a partner in the firm of Brunson & Bunch; that thereafter and contrary to the Court's ruling, and despite said ruling, the Court ruled and determined by his findings of fact and conclusions of law that the petitioning creditors are not creditors of the respond-

ent; that the petitioning creditors, nor either of them, did not lend any sum of money whatever to the said respondent during the nine months' period immediately preceding the filing of the petition in bankruptcy, and that the said respondent is not indebted to the petitioning creditors, or either of them, in any amount whatsoever; that the respondent is in no way responsible for the actions of the members of the co-partnership of Brunson & Bunch, in regard to the commission by the co-partners of any of the acts of bankruptcy alleged in the Amended Petition (Complaint); that each transaction between the respondent and the firm of Brunson & Bunch was the subject of a special agreement; that no representations were made by the respondent to the creditors of the said co-partnership, other than each transaction was governed by an agreement between the said respondent and the said partnership, whereby in consideration of the respondent's furnishing money belonging to his clients or to trusts over which he had control, the said partnership promised the said respondent a definite percentage of the profits; that no obligation was assumed by the said respondent for the successful culmination of the investment, or the payment of the profits guaranteed; that the clients knew that the profits to be derived from the enterprise were to be divided, so as to allow the respondent a profit for acting as the intermediary between them and the partnership; that the accounts of the clients were kept in the books of the partnership, and the profits which the respondent received, amounting

to ten per cent, were separate and distinct from the profits of the [136] partnership; that the said respondent entered such profits upon "whatever books he kept"; that no control was exercised by him over the conduct of the affairs of the partnership; and that all that the respondent had was the promise of a certain percentage of the profits, the amount of which depended on whether the money invested belonged to a trust in which he had an interest, or belonged entirely to clients.

(D) That ruling and order of the Court, repeatedly made and reiterated during the trial of said cause, excluding any and all evidence offered to show fraud on the part of respondent Wilbert C. Hamilton, committed against petitioning creditors and other creditors of the firm of Brunson & Bunch.

(E) That ruling and order of the Court (denying the motion of the attorneys for petitioning creditors, to compel the production by the respondent of his checks and other records relating to transactions between the said respondent and creditors of the firm of Brunson & Bunch, and more particularly, that certain check drawn by the respondent upon his Investors' Trust bank account in the Canadian Bank of Commerce, and made payable to one Thomas P. Campbell, in the approximate sum of \$82.00, and that certain check drawn by the respondent upon his Investors' Trust bank account in the Canadian Bank of Commerce, and made payable to the Rollaway Equipment Company in the approxi-

mate sum of \$4,000.00, which checks were admittedly in the possession of the said respondent.

(F) The ruling and order of the Court, as set forth in the findings of fact, that Wyman G. Reynolds, attorney at law, appeared at the trial of the within matter on behalf of Willard E. Brunson and Deon Bunch, a co-partnership, doing business as Brunson & Bunch.

That the particulars where in petitioning creditors allege the evidence to be insufficient to support the findings of fact and decision and judgment of the Court based thereon are as follows:

(1) That the respondent never associated with Willard E. Brunson and Deon Bunch in any co-partnership relationship of any kind or nature whatsoever.

(2) That the petitioners are not creditors of the respondent. [137]

(3) That none of the petitioning creditors lent any sum of money to the respondent during the nine months' period immediately preceding the filing of the petition, and that the respondent is not indebted to the petitioner, or either or any of them, in any amount.

(4) That the respondent is in no way responsible for the actions of the members of the co-partnership of Brunson & Bunch, to wit: Willard E. Brunson, and Deon Bunch, in regard to the commission by the said co-partners of any of the acts of bankruptcy alleged in the amended petition (complaint).

(5) That each transaction between the respondent and the partnership known as Brunson & Bunch was the subject of a special agreement, and that no representations were made by the respondent to any of the petitioning creditors or other creditors of the co-partnership, except that the said Hamilton was to furnish the said co-partnership money belonging to his clients or to trusts over which he had control, and that in consideration therefor, a definite percentage of the profits were promised respondent.

(6) That no obligation was assumed by the respondent for the successful culmination of the investment or the payment of the profits guarantees.

(7) That the clients knew that the profits to be derived from the enterprise were to be divided, so as to allow the respondent a profit for acting as the intermediary between them and the partnership.

(8) That the accounts of the clients were kept in the books of the partnership.

(9) That the profits which the respondent received (ten per cent) were separate and distinct from the profits of the partnership.

(10) That the profits received by the said respondent were so entered upon "whatever books he kept."

(11) That no control was exercised by the respondent over the conduct of the affairs of the partnership.

(12) That "all the respondent had was the promise of a certain percentage of the profits, the amount of which depended on whether the [138] money invested belonged to a trust in which he had an interest, or belonged entirely to clients."

(13) That the relationship between the respondent and the partnership of Brunson & Bunch had none of the indicia of a partnership, and that at most there existed a series of separate dealings of the joint venture type.

(14) That the respondent committed no act or acts which would show acts of estoppel warranting the court in declaring the respondent to be a general partner.

(15) That the respondent is not insolvent individually as defined by the Bankruptcy Act of 1938.

(16) That the petitioning creditors do not have claims fixed as to liability or liquidated as to amount as to the respondent Wilbert C. Hamilton.

That the reason why the evidence is insufficient to support the specifications and particulars hereinbefore set forth, numbered (1) through (16), inclusive, is the reason heretofore specified as an error of law, to wit, more particularly, the ruling made by the court and repeated throughout the proceedings and trial of said cause, that the only issue before the court, and the sole issue upon which the court would permit the petitioning creditors to offer any evidence was the issue whether or not the respondent, Wilbert C. Hamilton, was a partner

in the firm of Brunson & Bunch; and the further rulings made repeatedly by the court during the proceedings and the trial of the said cause, excluding any and all evidence offered to show fraud committed by the respondent, Hamilton, against the petitioning creditors and other creditors of the partnership of Brunson & Bunch.

That this motion is based upon and will be heard upon the pleadings and records and papers and documents on file in the above-entitled matter, and upon the minutes of the court, including not only the clerk's minutes, but any and all notes and memoranda which may have been kept by the Judge, and also the reporter's transcript of his shorthand notes, and the affidavits to be filed herewith, and upon this written motion. [139]

Dated this 11th day of October, 1948.

GLENN A. LANE and

H. H. SLATE,

Attorneys for Petitioning
Creditors.

By /s/ GLENN A. LANE. [140]

Points and Authorities

A Motion for New Trial May Be Granted by the Court After Judgment Upon the Following Grounds, Among Others:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which the losing party was prevented from having a fair trial.

(2) Accident or surprise which ordinary prudence could not have guarded against.

(3) Newly-discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial.

(4) Insufficiency of the evidence to justify the verdict or other decision.

(5) Error in law occurring at the trial.

Rule 17—Local Rules, U. S. District Court,
Southern District of California,
Coulston vs. U. S., 51 Fed. 2178.

Rule 59—Federal Rules of Civil Procedure.
Little vs. U. S., 73 Fed. 2 861.

A Motion to Set Aside, or Vacate, or Modify, or Alter, a Judgment May Be Granted by the Court in Its Discretion:

Rule 59—Federal Rules of Civil Procedure.

Boaz vs. Mutual Life Insurance Company
of New York, 146 Fed. 2 321. [141]

Received copy of the within motion October 11,
1948.

/s/ S. Y. ALLEN,
Attorney for Respondent.

[Endorsed]: Filed Oct. 12, 1948. [142]

[Title of District Court and Cause.]

AFFIDAVITS OF GLENN A. LANE, G. N. WIL-
LIAMS, H. H. SLATE AND GEORGE B.
McCLYMAN, IN SUPPORT OF MOTIONS
FOR NEW TRIAL AND TO SET ASIDE
AND VACATE JUDGMENT

State of California,
County of Los Angeles—ss.

Glenn A. Lane, being first duly sworn, deposes
and says:

That Affiant is a citizen of the United States and
of the State of California, over the age of twenty-
one years, and at all times herein mentioned has
been and now is an attorney at law, duly licensed
to practice and practicing his profession in all
of the courts of the State of California, and duly
licensed to practice and practicing his profession in
the U. S. District Court, in and for the Southern
District of California;

That at all times mentioned herein Affiant has
been and now is one of the attorneys of record for
the petitioning creditors in the above-entitled mat-
ter; that during the trial of the issues raised by
the answer of the respondent, Wilbert C. Hamilton,
to the First Amended Involuntary Petition in Bank-
ruptcy, before the Honorable Leon R. Yankwich,
Judge presiding, and particularly on the [143] 30th
day of June, 1948, at about the hour of 12:40 p.m.,
the following matters and things transpired, and
the following statements were made, to wit:

That at about the hour aforesaid, and while the Honorable Leon R. Yankwich was presiding in the trial of the issues of said case, the said Honorable Leon R. Yankwich stated that the court was then adjourning for the usual noon recess; that counsel should prepare themselves for night sessions to try said case, because the Court was scheduled to leave for San Francisco, California, to try other matters, at the conclusion of the next day, to wit, July 1, 1948, and that the Court was going to finish the trial of the issues then pending before the Court in the above-entitled matter, within the period of three days, to wit, June 29, June 30, and July 1, 1948, which he had allotted to said case, and that if it was necessary to stay over for night sessions, the Court was giving counsel fair warning at that time that the Court would still see that the case was finished within that time;

That the Court further stated that if said case was not completed at the conclusion of the next day, that the Court would declare a mistrial, and would send the case back for trial before some other Judge;

That the Court thereupon reiterated its remarks that the case would have to be completed within the period of three days' total time allotted by him to the case, and that if it was not completed by the end of the next day, he would declare a mistrial; that he, the Court, had set aside three days for the case, and that that was all the time that was going to be allotted to the case; that there was no reason

why said matter could not be completed within the said three days, and that counsel could prepare themselves for night sessions;

That the Court further stated that the only issue before the Court was the simple question of determining whether or not the [144] respondent, Wilbert C. Hamilton, was a partner in the firm of Brunson & Bunch, and that the case was going to be completed within the said three days, or the Court would declare a mistrial;

That Affiant thereupon stated to the Court that "Your Honor, if that is the decision of the Court, you might just as well declare a mistrial at this time, because this case cannot be completed by tomorrow night, and in our opinion, the trial of this case will require at least four weeks."

That thereupon the said Court stated that this case was going to be completed within the three days' time allotted to it, and that "there is no reason why the simple question of whether or not Hamilton is a partner should consume any more time than three days," and that the Court was not going to declare any mistrial; and that counsel could come back at 2:00 p.m. and the case would proceed to trial and would be completed within the time allotted to it, that there was no reason why the case should consume four weeks, and the Court could not see how it could possibly consume four weeks;

That the Court thereupon stated, "You told me that this case would take only three days to try. When this case was set for hearing at the previous date, I said that I could continue it to this date, and

that it would have only three days, and you told me that you could try this case within three days." Affiant then stated to the Court, "If the Court please, the Court's statement is in error, because I was not even present in Los Angeles County at the time that this matter was continued, and I have never at any time made any statement to the Court to that effect, and I was not present at any time when I could have made any such statement, and in fact, at the time that the Court claims I made such a statement, I was in San Francisco."

That the Court thereupon stated, "Well, somebody said it would take only three days." Affiant thereupon stated, "I was not [145] present at the time that the matter was continued, but it is my understanding that opposing counsel made the statement at that time as they have made on other occasions when I was present, that the case should be tried and completed in three days." The Court thereupon stated in effect that Affiant had deliberately misled the Court and that Affiant as "now attempting to mislead the Court" by his actions, and that the Court had no intention of granting a mistrial, now that the case had proceeded thus far, and that Affiant's "attempt to get the Court to grant a mistrial" was very unfair to the Court, and that the Court was "being imposed upon" by Affiant, and that if Affiant would "get down and try the case and quit trying to get into issues that have nothing to do with the case," that the case could be completed in three days and within the time allotted, and that the Court was refusing to declare a mis-

trial, and would not let the petitioning creditors and their attorneys “get out of trying this case, now that we have gone this far.”

That Affiant thereupon noted that the court reporter was sitting at his desk and not taking down any of the remarks of the Court, or any of the proceedings that were then transpiring; that Affiant thereupon stated to the Court substantially as follows: “I notice that the reporter is not reporting these proceedings and is not taking down the statements of the Court, and I believe that these proceedings are very important, and that the remarks of the Court are very pertinent, and that the reporter should be reporting all of these proceedings, and I ask the Court to please instruct the reporter to take down all of the proceedings that are now transpiring, and to report the remarks of the court and any remarks that I make, or any other counsel in this proceeding.” The Court thereupon stated, “He doesn’t have to report these proceedings, and I am instructing him not to report what I am saying to you and what you are saying at this time. He is my reporter, and I will tell him [146] “what I want him to report, and you won’t tell him what is to be reported, and you won’t tell me what is to be reported. I am running this courtroom, and I will have my reporter report what I want him to report. and when I want to make remarks directed to you like I am doing, I don’t want my reporter to take those down, and I am telling him right now not to take them down. I have a right to tell you what I think about the way you are trying the case, and I

have a right to talk to you about this case without having the reporter write down what I am saying. I will run this case in my own way, and I will run this courtroom in my own way, and you are not coming up here and telling me how to run my court and how to try cases. I have been trying cases for 21 years, and I know how to run my court, and you are not coming up here and telling me when and what my reporter will report on these proceedings and how I will try the case. My reporter will not report these remarks, and that is the way I am going to run my court.”

Affiant thereupon stated, “I believe that your Honor’s ruling is erroneous and that we are entitled to have all of the remarks of the court which are made in the conduct of the trial of the case, and particularly any remarks made in the open courtroom, reported by the reporter, and I assign the remarks just made by the Court as error, and I object to the Court’s remarks and object to the Court’s ruling, and again ask the Court to instruct the reporter to record all of the remarks made by the court or by me or by any other counsel in these proceedings, and I ask the Court to immediately instruct the reporter to take down what I am saying right now, and to report every remark hereafter made by the Court.”

That the Court thereupon stated that the reporter would not report “any part of it,” that the court was not in session, that he had taken a recess and that he would “run my trial the way I want to,” and that the “attempt” on the part of Affiant to

get a [147] mistrial was unfair to the Court; that counsel "had misled the Court from the start," and that the Court wasn't trying "to force anybody to do what is impossible," but that the Court saw no reason why the case could not be completed within three days' total time, and that counsel could come back at 2:00 o'clock and put on his witness and proceed with the trial of the case, and that the case was definitely going to be completed by the end of the next day.

That the Court then stated, "You will come back into this courtroom at 2:00 p.m., and you will put on Mrs. Hamilton, the wife of Mr. Hamilton, as your next witness."

That Affiant thereupon stated, "You have already ordered me to put on Virginia Kerr at 2:00 p.m., and I find it difficult to understand how the Court expects me to put on two witnesses simultaneously."

That the Court thereupon stated, "You will put on the witness that I tell you to, and I tell you that when you come back at 2:00 o'clock, you will put on Mrs. Hamilton as your next witness." That Affiant thereupon stated, "You will recall that you have already ordered me to put on Virginia Kerr as my next witness when I return this afternoon." That the Court thereupon stated, "I am now ordering you to put on Mrs. Hamilton. Do you understand? You will put on Mrs. Hamilton when you return at 2:00 o'clock, and after I hear Mrs. Hamilton's testimony, I will decide whether you can keep these witnesses waiting in the courtroom. Do you under-

stand that you will put on Mrs. Hamilton when you return at 2:00 o'clock?" That Affiant thereupon stated, "I will decide that when I return here at 2:00 o'clock." The Court thereupon stated, "You will not decide anything of the kind. I am ordering you right now that you will put on Mrs. Hamilton at 2:00 o'clock, as your next witness."

That Affiant thereupon stated, "You have already ordered me to put on my best witness at 2:00 o'clock, and have further [148] ordered me to put on Virginia Kerr as my next witness at two o'clock. I will not be placed in the position of deciding who is my best witness, and we will wait until two o'clock to decide what witness will be put on next."

That the Court thereupon stated, "There is no reason why this case should take all the time you claim is necessary to try the case. It can be tried in the three days that I have allotted, and I am going to do my best to try the case in that time, and get it completed. There is no reason that I can understand why the case should take more than that time, and you never told me it would take any more than that. When I opened Court yesterday morning, you did not say anything about it."

That Affiant thereupon stated, "When you opened court yesterday morning, you did not ask anyone to give you an estimate of how long the case would take to try. You stated then that you did not want any opening statement from counsel, because this case was going to be completed in the three days that you had set aside for it, and that you were familiar

with the case from having read the pleadings, and you did not want any statement from counsel; that you wanted the petitioning creditors to put on their first witness and proceed with the trial of the case, and it was going to be completed in three days. At that point I discussed with associate counsel the fact that we could not complete the case in three days, and we were at a loss to know what to do in view of the fact that the Court had positively stated that you wanted no statements from anybody, but for us to put on our first witness. If the Court please, the fact is that we have an audit report which has just been completed within the last week, which is 224 pages long, of closely-spaced typing, and which we did not have until the last few days, and which was not in our possession or completed at the time that the case was continued to a later date for trial. We wish to cover the subject matter included in that [149] audit report, and we cannot possibly do so in three days, and in our opinion, it will require four weeks to properly try this case and cover the matters set forth in the audit report.”

The Court thereupon stated, “The only issue before this Court is the question whether or not Wilbert Hamilton is a partner in the firm of Brunson & Bunch, and the further question whether or not he is insolvent. I don’t see how the auditor’s report could have anything to do with those issues, but anyway, I am familiar with auditors’ reports and I know a lot about those things and if you will file that report, it won’t be necessary to bring the

auditor in as a witness, and I can take the report myself and can study it over and you won't have to take all the time of the Court to introduce the evidence by the auditor. I am not going to permit you to take this Court's time to go over all those things in the auditor's report because I can get those things out of it just as well as he can."

Affiant thereupon stated, "I wish to direct the Court's attention to the fact that the reason why I made any statement to the Court at this time was simply in answer to the Court's statement that unless this case was completed within the three days' time allotted, the Court would declare a mistrial. I simply arose to tell the Court that if that was your position, you might as well declare a mistrial at this time, because it is impossible for us to complete our portion of the case within the three days that you speak of, and the opposing counsel will certainly be entitled to some time to offer evidence on their side. At least I assume at this time that the Court is not in a position to decide now that there will be no time allotted to opposing counsel to present their side of the case."

That the Court thereupon stated, "Counsel grabbed on a mis-statement made by the Court, that the Court was going to declare a mistrial," and that "the Court was thinking of a trial by jury and [150] was thinking of the fact that on a jury trial, if the Court had to go away for that length of time, there would have to be a mistrial declared"; that he was going to San Francisco, and would be gone for several weeks, and that "if it was a jury trial,

there would have to be a mistrial declared, but that since it was a court trial of course it will not be necessary to declare a mistrial, and I can continue the matter for a hearing when I return from San Francisco. I will have no further argument with you at this time. I am instructing you now to return at two o'clock, and I am instructing you to put on Mrs. Hamilton as your next witness at that time."

That during the entire proceedings related herein, the court reporter sat at his desk and apparently made no notes whatsoever.

Dated: October 9, 1948.

/s/ GLENN A. LANE,
Affiant.

Subscribed and sworn to before me this 9th day of October, 1948.

[Seal] /s/ H. H. SLATE,
Notary Public in and for Said
County and State. [151]

State of California,
County of Los Angeles—ss.

H. H. Slate, being first duly sworn, deposes and says:

That Affiant is a citizen of the United States and of the State of California, over the age of twenty-one years, and at all times herein mentioned has been and now is an attorney at law, duly licensed to practice and practicing his profession in all of the Courts of the State of California, and in the

U. S. District Court, in and for the Southern District of California;

That at all times mentioned herein Affiant has been and now is one of the attorneys of record for the petitioning creditors in the above-entitled matter;

That Affiant has read the affidavit of Glenn A. Lane, dated October 9, 1948, and set out hereinbefore, which relates to statements made and proceedings that transpired before the Honorable Leon R. Yankwich, Judge presiding, on the 30th day of June, 1948;

That Affiant was present in Court at all times mentioned in said affidavit of Glenn A. Lane; that Affiant heard the proceedings which transpired in said Court at said time; that the statements as set forth in said affidavit of Glenn A. Lane are correct and that to the best of Affiant's recollection, the remarks of the Court and remarks of counsel were made as set forth in said affidavit; that if Affiant were called as a witness before the said above-entitled Court, or any other court of competent jurisdiction and were asked to relate the matters and things which transpired and the statements which were made by the Honorable Leon R. Yankwich and by the said Glenn A. Lane, that Affiant would testify to the matters set forth in the said affidavit of the said Glenn A. Lane and would testify to the conversations as set forth in said affidavit of Glenn A. Lane; that in short, Affiant believes that the said affidavit is correct, and that the statements therein set [152] forth purported to have been made by

the Honorable Leon R. Yankwich and the said Glenn A. Lane are fairly and accurately set forth, and that the said statements comprise all of the remarks that were made at said time.

Dated: October 9, 1948.

/s/ H. H. SLATE,
Affiant.

Subscribed and sworn to before me this 9th day of October, 1948.

[Seal] /s/ GLENN A. LANE,
Notary Public in and for Said
County and State. [153]

State of California,
County of Los Angeles—ss.

G. N. Williams, being first duly sworn, deposes and says:

That Affiant is a citizen of the United States and of the State of California, over the age of twenty-one years, and at all times herein mentioned has been and now is an attorney at law, duly licensed to practice and practicing his profession in all of the courts of the State of California, and in the U. S. District Court in and for the Southern District of California. in and for the Southern District of California;

That Affiant has read the affidavit of Glenn A. Lane, dated October 9, 1948, and set out hereinbefore, which relates to statements made and proceedings that transpired before the Honorable Leon R. Yankwich, Judge presiding, on the 30th day of June, 1948;

That Affiant was present in Court at all times

mentioned in said affidavit of Glenn A. Lane; that Affiant heard the proceedings which transpired in said Court at said time; that the statements as set forth in said affidavit of Glenn A. Lane are correct and that to the best of Affiant's recollection, the remarks of the Court and remarks of counsel were made as set forth in said affidavit; that if Affiant were called as a witness before the said above-entitled Court, or any other court of competent jurisdiction and were asked to relate the matters and things which transpired, and the statements which were made by the Honorable Leon R. Yankwich and by the said Glenn A. Lane, that Affiant would testify to the matters set forth in the said affidavit of the said Glenn A. Lane, and would testify to the conversations as set forth in said affidavit of Glenn A. Lane; that in short, Affiant believes that the said affidavit is correct, and that the statements therein set forth and purported to have been made by the Honorable Leon R. Yankwich and the said Glenn A. Lane are fairly and accurately set forth, and that the said statements comprise all of the remarks that were [154] made at said time.

Dated: October 9, 1948.

/s/ G. N. WILLIAMS,
Affiant.

Subscribed and sworn to before me this 9th day of October, 1948.

[Seal] /s/ H. H. SLATE,
Notary Public in and for Said
County and State. [155]

State of California,
County of Los Angeles—ss.

George B. McClyman, being first duly sworn, deposes and says:

That Affiant is a citizen of the United States and of the State of California, over the age of twenty-one years, and is one of the petitioning creditors in the above-entitled matter;

That Affiant has read the affidavit of Glenn A. Lane, dated October 9, 1948, and set out hereinbefore, which relates to statements made and proceedings that transpired before the Honorable Leon R. Yankwich, Judge presiding, on the 30th day of June, 1948;

That Affiant was present in Court at all times mentioned in said affidavit of Glenn A. Lane; that Affiant heard the proceedings which transpired in said Court at said time; that the statements as set forth in said affidavit of Glenn A. Lane are correct and that to the best of Affiant's recollection, the remarks of the Court and remarks of counsel were made as set forth in said affidavit; that if Affiant were called as a witness before the said above-entitled Court, or any other court of competent jurisdiction and were asked to relate the matters and things which transpired, and the statements which were made by the Honorable Leon R. Yankwich, and by the said Glenn A. Lane, that Affiant would testify as to the matters set forth in the said affidavit of the said Glenn A. Lane, and would testify to the conversations as set forth in said affidavit of Glenn

A. Lane; that in short, Affiant believes that the said affidavit is correct, and that the statements therein set forth and purported to have been by the Honorable Leon R. Yankwich and the said Glenn A. Lane are fairly and accurately set forth, and that the said statements comprise all of the remarks that were made at said time.

Dated: October 9, 1948.

/s/ GEORGE B. McCLYMAN,
Affiant. [156]

Subscribed and sworn to before me this 9th day of October, 1948.

[Seal] /s/ H. H. SLATE,
Notary Public in and for Said
County and State. [157]

Received copy of the within affidavits October 11, 1948.

/s/ S. Y. ALLEN,
Attorney for Respondent.

[Endorsed]: Filed Oct. 12, 1948. [158]

[Title of District Court and Cause.]

AFFIDAVIT OF MARY E. HAMILTON IN OP-
POSITION TO AFFIDAVITS OF GLENN
A. LANE, G. N. WILLIAMS, H. H. SLATE
and GEORGE B. McClyman on MOTION
FOR NEW TRIAL AND TO SET ASIDE
AND VACATE JUDGMENT.

State of California,
County of Los Angeles—ss.

Mary E. Hamilton, being first duly sworn ac-
cording to law, deposes and says:

That she is the wife of Wilbert C. Hamilton,
respondent in the above-entitled matter; that she
is the mother of three minor daughters, Betty and
Barbara Hamilton, twins, at said time age seven
years, and Patricia Joan Hamilton, age six years;
that affiant was subpoenaed to appear at the above-
entitled Court on the 29th day of June, 1948, at
the hour of 10:00 o'clock of said date; that affiant
was present at the time Court was opened; that
numerous witnesses were subpoenaed who were
friends and clients of her husband, respondent Wil-
bert C. Hamilton; that during the course of the
trial, on June 29, 1948, Wilbert C. Hamilton ad-
dressed the Court and stated that your affiant was
his wife; that she was not well and that there [159]
were three small children at home with no one to
look after them and asked that she be excused;
that that conversation took place between the at-
torneys and the Honorable Judge Yankwich, and

that as a result of said conversation she was asked to address the Clerk and to listen to the Clerk's voice and that she would be excused until telephoned by the Clerk to come back to Court; that she never received any telephone call from the Clerk, nor did anyone else request her to return to Court and that she was never in Judge Yankwich's Court at any time prior or subsequent to June 29th except on June 29th only when she was excused.

Further affiant sayeth not.

/s/ MARY E. HAMILTON.

Subscribed and sworn to before me this 14th day of October, 1948.

[Seal] /s/ S. H. REDPATH,

Notary Public in and for Said
County and State. [160]

Received copy of the within Affidavit of Mary E. Hamilton this 15th day of October, 1948.

/s/ H. H. SLATE,

Attorney for Petitioning
Creditors.

[Endorsed]: Filed Oct. 16, 1948. [161]

At a stated term, to wit: The Sept. Term, A.D. 1948, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday, the 25th day of October, in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable Leon R. Yankwich,
District Judge.

[Title of Cause.]

For hearing motion filed Oct. 12, 1948, of petitioning creditors for new trial and to vacate judgment of Sept. 30, 1948; Glenn A. Lane and H. H. Slate, Esqs., appearing as counsel for petitioning creditors; S. Y. Allen, Esq., appearing as counsel for Respondent Hamilton;

Attorney Lane argues in support of said motion, and Court orders said motion for new trial, etc., denied. [168]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that George B. McClyman, Elizabeth Spencer Sauers, Elizabeth Brau, and Willis N. Urie, petitioning creditors in the above-entitled action, hereby appeal to the Circuit Court of

Appeals for the Ninth Circuit, from the final judgment entered in this action on September 30, 1948, and from the order and judgment denying motion of petitioning creditors for a new trial, entered on October 25, 1948.

GLENN A. LANE and

H. H. SLATE,

Attorneys for Petitioning
Creditors.

By /s/ H. H. SLATE.

[Endorsed]: Filed Nov. 24, 1948. [169]

State of California,

County of Los Angeles—ss.

On this 24th day of November, 1948, before me, H. Handorf, a Notary Public in and for the County and State aforesaid, residing therein, duly commissioned and sworn, personally appeared M. Klotz and known to me to be the person whose name is subscribed to the within instrument as the attorney-in-fact of the Continental Casualty Company, and acknowledged to me that she subscribed the name of the Continental Casualty Company thereto as principal and her own name as Attorney-in-fact.

[Seal] /s/ H. HANDORF,

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires July 25, 1952.

[Endorsed]: Filed Nov. 24, 1948. [170]

[Title of District Court and Cause.]

COST BOND ON APPEAL

Whereas, George B. McClyman, Elizabeth Spencer Sauers, Elizabeth Brau, Willis N. Urie, petitioning creditors in the above-entitled action, have appealed to the Circuit Court from a judgment made and entered against said Petitioning Creditors in said action in the above District Court, in favor of the said Wilbert C. Hamilton in said action, on the 30th day of September, 1948, for none Dollars Principal, and Three Hundred Two and 78/100 (\$302.78) Dollars cost of suit.

Now, Therefore, in consideration of the premises and of such appeal, the Continental Casualty Company, incorporated under the laws of the State of Illinois and authorized to execute bonds and undertakings as sole Surety, does hereby undertake and promise on the part of the said Appellants, that the said Appellants will pay all damages and costs which may be awarded against them on the appeal, or on a dismissal thereof, not exceeding Two Hundred Fifty (\$250.00) Dollars, to which amount it acknowledged itself bound.

Signed, sealed and dated this 24th day of November, 1948.

CONTINENTAL CASUALTY COMPANY.

[Seal] By /s/ M. KLOTZ,

Attorney-in-Fact.

Examined and recommended for approval as provided in Rule 8.

/s/ GLENN A. LANE,

Attorney. [170]

[Title of District Court and Cause.]

AFFIDAVIT OF H. H. SLATE FOR ORDER
EXTENDING TIME TO PREPARE TRAN-
SCRIPT OF RECORD AND DOCKET AP-
PEAL, AND ORDER EXTENDING TIME
TO PREPARE TRANSCRIPT OF RECORD
AND DOCKET APPEAL

State of California,
County of Los Angeles—ss.

H. H. Slate, being first duly sworn, deposes and says that:

He is one of the attorneys of record for the petitioning creditors and the appellants in the above-entitled action;

That Notice of Appeal in the above-entitled matter was filed by the petitioning creditors on the 24th day of November, 1948; that Appellants' Designation of Contents of Record on Appeal was filed on the 30th day of November, 1948; that Appellants received by service upon Affiant copies of Appellees' Objection to Condensed Statement in Narrative Form of Part of the Testimony, as offered by Appellants, and Designation by Appellees of Additional Contents of Record on Appeal, on the 7th day of December, 1948; that also on the 7th day of December, 1948, Affiant was served by the attorneys [208] of record for the Appellee with Notice of Motion Fixing the Amount of Bond for Costs on Appeal, and for an Order Upon the Purported Appellants requiring Them to Give the Appeal Bond Forthwith;

That said motion was heard by the above-entitled Court, Honorable Leon R. Yankwich Presiding therein, in Department Five, on the 13th day of December, 1948; that at said time, on the 13th day of December, 1948, Affiant was informed by the above-entitled Court that the designation of the entire reporter's transcript as demanded by the Appellee in the aforesaid Appellee's Objection to Condensed Statement in Narrative Form of Part of the Testimony, and Designation by Appellee of Additional Contents of Record on Appeal, was a matter of right of the Appellee, and not a matter of discretion upon hearing by the Court;

That immediately thereafter, on the 14th day of December, 1948, Affiant contacted Marie B. Zellner, one of the official reporters at the trial of the above-entitled action, and advised Mrs. Zellner that the entire transcript of the proceedings at the trial of the above-entitled matter would be required on the said appeal; that the said Mrs. Zellner advised Henry Dewing, one of the reporters at the trial of the said action, and the reporter who had taken the majority of the testimony, was ill and had been ill for many weeks, having suffered a partial nervous breakdown; that she was therefore unable to state when the transcription would be completed;

That thereafter, on the 16th day of December, 1948, Affiant was advised by Theodore Hocke, Chief Deputy of the above-entitled Court, that the said Henry Dewing was expected to return to his duties as official court reporter momentarily, and that the said Dewing's estimate of the time required to tran-

scribe the testimony taken by the said Dewing at the said trial would necessarily have to be made by the said Dewing;

That on the date hereof, the 22nd day of December, 1948, [209] Affiant was advised by the Clerk of the Court that the said Dewing had returned to his duties on the morning thereof, but had remained only a short time and then departed for home; and that the said Dewing was in bad physical condition and unable to perform his duties as official court reporter on a full-time basis;

That the said Mrs. Marie Zellner and the said Theodore Hocke have advised Affiant that due to the physical condition of the said Henry Dewing, the transcription of the testimony of the trial in the within action will probably not be completed before the middle of February or thereafter;

That by reason of all and singular of the foregoing, Affiant makes this affidavit for the purpose of requesting the above-entitled Court and the Honorable Leon R. Yankwich, Judge thereof, to extend the period for filing and docketing the appeal in said cause to and including the 21st day of February, 1949.

/s/ H. H. SLATE.

Subscribed and sworn to before me this 22nd day of December, 1948.

[Seal]

/s/ GLENN A. LANE,

Notary Public in and for Said
County and State. [210]

ORDER

Upon reading the foregoing affidavit, and good cause appearing therefor, it is hereby Ordered that Notice of Motion for extension of time within which to prepare and docket record on appeal, and service of copies of said notice and the foregoing affidavit upon appellee be and the same hereby is dispensed with, and It Is Hereby Ordered that appellants shall have to and including the 21st day of February, 1949, within which to file the transcript of record and docket the appeal in the above-entitled cause.

Dated: December 22, 1948.

/s/ LEON R. YANKWICH,
Judge Presiding.

[Endorsed]: Filed Dec. 22, 1948. [211]

[Title of District Court and Cause.]

MEMORANDUM DECISION

The above-entitled cause heretofore tried, argued and submitted, and the various motions filed therein, heretofore argued and submitted, are now decided as follows:

I.

On the merits, judgment will be for the respondent Wilbert C. Hamilton, that the petitioners take nothing by their involuntary petition in bankruptcy against him, either as a member of the partnership of Brunson & Bunch, or individually, and that said

involuntary petition in bankruptcy be, and the same is, hereby dismissed as to the said Wilbert C. Hamilton, both as a member of the partnership of Brunson & Bunch and individually.

II.

The motion of the respondent Wilbert C. Hamilton to dismiss the proceedings, filed on March 24, 1948, and the companion motion to dismiss the first amended [115] petition as to him is, and the same is hereby granted.

III.

The other motions on which rulings have been reserved, for judgment on the pleadings, for summary judgment and to strike answers to interrogatories are, and the same are hereby denied.

IV.

The proceedings as to the partnership, Brunson & Bunch, and the admitted partners, Willard E. Brunson and Deon Bunch, under the Order of Adjudication dated November 13, 1947, are returned to the Honorable Hugh L. Dickson, Referee in Bankruptcy, for further administration.

COMMENT

The petition here was filed jointly against the partnership of Brunson & Bunch, of which it was alleged that the respondent Wilbert C. Hamilton was a member, and against him individually. On default, the partnership was adjudicated a bankrupt on November 13, 1947. The respondent appeared and denied membership in the partnership and insolvency.

To succeed, the petitioners had the burden of showing that the defendant was a general partner. (11 U.S.C.A. Sec. 23.) This they have failed to do.

The Bankruptcy Act of 1938 does not define the word "partnership." So we must fall back for its meaning on the general law of partnership and the state law of California. Whichever criterion we apply to the evidence, it is insufficient to establish a partnership. For the relationship here was not that of persons associated "to carry on a business for profit." (California Civil Code, Sec. 2400.) The dealings were governed by agreements entered into by the respondent and the partnership whereby, in consideration of the respondent's furnishing money belonging [116] to his clients or to trusts over which he had control, a definite percentage of the profits was promised. Each transaction was the subject of a special agreement. No other representations were made by the respondent to any of the clients. Nor was any obligation assumed by him for the successful culmination of the investment or the payment of the profits guaranteed. The clients knew that the profits to be derived from the enterprise were to be divided, so as to allow the respondent a profit for acting as the intermediary between them and the partnership. The accounts of the clients were kept in the books of the partnership, and the profits which the respondent received—10 per cent—were separate and distinct from the profits of the partnership. They were so entered upon whatever books he kept. No control was exercised by him over the conduct of the affairs of the part-

nership. All that the respondent had was the promise of a certain percentage of the profits, the amount of which depended on whether the money invested belonged to a trust in which he had an interest, or belonged entirely to clients. So the relationship between the respondent and the partnership has none of the indicia of a partnership. At most, we have a series of separate dealings of the joint venture type. Nor does the record show acts of estoppel which would warrant the court in declaring the respondent to be a general partner. (See, Collier on Bankruptcy, 14th Ed., Vol. 1, Sec. 5.02; California Civil Code, Secs. 2400, 2401, 2410; Lott v. Young, 9 Cir., 1901, 109 Fed. 798; Partner Williams, 1 Cir., 1924, 297 Fed. 696; Klope v. Pongratz, 1940, 38 C. A. (2) 395, 401-404.)

The conclusion reached makes it unnecessary to determine whether the respondent, individually, is insolvent. However, it should be added that, in this respect [117] also, the evidence fails to show insolvency as defined by the Bankruptcy Act of 1938. (11 U.S.C.A. Sec. 1(19).)

Hence the ruling above made.

Counsel for the respondent will prepare findings and decree in conformity with the views here expressed, under Local Rule 7.

Dated this 14th day of September, 1948.

/s/ LEON R. YANKWICH,
U. S. District Judge.

[Endorsed]: Filed Sept. 14, 1948. [118]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANTS INTEND TO RELY ON APPEAL

1. Error of the court in excluding evidence offered by petitioning creditors to establish fraud and deceit practiced by the respondent, Wilbert C. Hamilton, upon the petitioning creditors and other creditors of the partnership of Brunson & Bunch.

2. Error of the court in excluding evidence offered by petitioning creditors to establish a general plan and scheme on the part of the respondent, Wilbert C. Hamilton, and Willard E. Brunson and Deon Bunch to cheat and defraud the petitioning creditors and other creditors of the partnership of Brunson & Bunch.

3. Error and misconduct of the court in directing the court reporter not to report certain remarks of the Court made during the trial.

4. Error and misconduct of the court in the court's ruling and statement that the court reporter belonged to the court and that [171] the court reporter need not report all of the remarks of the Court or all of the proceedings before the court, but need only report what the court ordered the reporter to record and report during the trial of the proceedings.

5. Error of the court in its finding of fact, finding and determining that the respondent, Wil-

bert C. Hamilton, is not indebted to the petitioner, George B. McClyman, in any amount whatsoever.

6. Error of the court in its finding that the respondent, Wilbert C. Hamilton, is not indebted to the petitioner, Elizabeth Spencer Sauers, in any amount whatsoever.

7. Error of the court in its finding that the respondent, Wilbert C. Hamilton, is not indebted to the petitioner, Elisabeth Brau, in any amount whatsoever.

8. Error of the court in its finding that the respondent, Wilbert C. Hamilton, is not indebted to the petitioner, Willis N. Urie, in any amount whatsoever.

9. Error of the court in its finding that the respondent, Wilbert C. Hamilton, is in no way responsible for the actions of the members of the co-partnership of Brunson & Bunch, to wit, Willard E. Brunson and Deon Bunch, in regard to the commission by the said co-partners of any of the acts of bankruptcy alleged in the Amended Complaint (Petition).

10. Error of the court in its finding that with reference to the dealings between the respondent, Wilbert C. Hamilton, and the partnership of Brunson & Bunch, each transaction was the subject of a special agreement and that no other representations were made by the respondent to any of the clients (investors).

11. Error of the court in its finding that the petitioning creditors are not creditors of the respondent, Wilbert C. Hamilton.

12. Error of the court in its finding that the accounts of the clients (investors) were kept in the books of the partnership, [172] and the profits which the respondent received amounted to ten per cent, and were separate and distinct from the profits of the partnership; that such profits were "so entered upon whatever books he kept."

13. Error of the court in its finding that no control was exercised by the respondent over the conduct of the affairs of the partnership.

14. Error of the court in its finding that all that the respondent had was the promise of a certain percentage of the profits, the amount of which depended on whether the money invested belonged to a trust in which he had an interest, or belonged entirely to clients.

15. Error of the court in its finding that the respondent Wilbert C. Hamilton was never associated with Willard E. Brunson and Deon Bunch in any co-partnership relationship of any kind or nature whatsoever.

16. Error of the court in making findings of fact and drawing conclusions of law from such findings of fact, which findings of fact and conclusions of law are and each is outside of the issues, and not within the issues framed by the pleadings in the case,

and each and all thereof being unsupported by the evidence admitted in the case.

17. Error of the court in its finding that Wyman G. Reynolds, attorney at law, appeared in the trial on behalf of Willard E. Brunson and Deon Bunch, a co-partnership, doing business as Brunson & Bunch.

GLENN A. LANE and

H. H. SLATE,

Attorneys for Petitioning
Creditors.

By /s/ H. H. SLATE. [173]

November 30, 1948:

Received of H. H. Slate as of the above-stated date copy of Statement of Points upon Which Appellants Intend to Rely on Appeal.

/s/ S. Y. ALLEN.

[Endorsed]: Nov. 30, 1948. [174]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 211, inclusive, contain the original Involuntary Petition in Bankruptcy; Two Orders of General Reference; Answer to Involuntary Petition in Bankruptcy; Request for Jury Trial; Petition and Order to File First Amended Invol-

untary Petition in Bankruptcy; First Amended Involuntary Petition in Bankruptcy; Affidavit of Wilbert C. Hamilton; Answer to First Amended Involuntary Petition in Bankruptcy with Interrogatories With Request that They be Answered Under Oath, i.e. by Each of the Petitioning Creditors Separately; Order to Answer Interrogatories; Request for Jury Trial; Petition and Order Extending Time to File Answers to Interrogatories; Separate Answers of Elizabeth Brau, Elizabeth Spencer Sauers, Willis N. Urie and George B. McClyman to Interrogatories; Answer to First Amended Involuntary Petition in Bankruptcy; Debtor's Petition filed Feb. 4, 1948, signed by Deon Bunch; Motion for Order re Delivery of Partnership Records and Affidavit in Support Thereof; Order of Referee re Citation to Judge re Contempt; Referee's Certification to Judge of Receiver's Petition; Petition for Contempt Citation; Notice of Motion to Release Attachments on Behalf of Wilbert C. Hamilton; Separate Affidavits of S. H. Redpath, Fletcher L. Baughn and Wilbert C. Hamilton; Order re Examination of Records, Papers and Effects of and in Possession of Alleged Bankrupt; Minute Order Entered April 5, 1948; Memorandum Decision; Summary of Debts and Assets; Objections to Findings of Fact and Conclusions of Law; Findings of Fact and Conclusions of Law; Judgment; Motion for New Trial and to Vacate and Set Aside Judgment; Affidavits of Glenn A. Lane, G. N. Williams, H. H. Slate and George B. McClyman, in support of Motions for New Trial and to Set Aside and Vacate

Judgment; Separate Affidavits of Mary E. Hamilton and Wilbert C. Hamilton in Opposition to Affidavits of Glenn A. Lane et al; Minute Order Entered October 25, 1948; Notice of Appeal; Cost Bond on Appeal; Statement of Points Upon Which Appellants Intend to Rely on Appeal; Appellants' Designation of Contents of Record on Appeal; Condensed Statement in Narrative Form of Part of the Testimony; Appellee's Objections to Designation of Contents of Record on Appeal, etc.; Objections to Condensed Statement in Narrative Form, etc.; and Affidavit and Order Extending Time to File Record and Docket Appeal which, together with original depositions of Elizabeth Brau, Elizabeth Spencer Sauers, Elizabeth Spencer Sauers, and George B. McClyman and Willis N. Urie, original petitioners' exhibits 2 to 50, inclusive, and respondents A to K, inclusive, and original reporter's transcript of proceedings on June 29 and 30, July 1, September 7, 8 and 9, 1948, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.80 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 10 day of February, A.D. 1949.

EDMUND L. SMITH,
Clerk.

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy.

In the District Court of the United States for the
Southern District of California, Central Division

No. 45,310-Y—In Bankruptcy

In the Matter of:

WILBERT C. HAMILTON, Individually, and the
Partnership Known as BRUNSON AND
BUNCH, Composed of WILLARD E. BRUN-
SON, DEON BUNCH, and the Said WIL-
BERT C. HAMILTON,
Alleged Bankrupts.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Los Angeles, California
Tuesday, June 29, 1948

The Court: Incidentally, gentlemen, I want to say this: As you understand, I reserved not more than three days for this case. This case has to be concluded on Thursday, because on Friday I am on my way to San Francisco on an assignment by the senior circuit judge to hold court there for the month of July. You will remember this case was set for an earlier date, and was continued at your request. So everyone has to work and work very fast, and the case must be concluded, that is, the taking of evidence must be concluded on Thursday. Otherwise it will have to go over until September for conclusion. I just want to give you that warning. This is the kind of a matter that can be disposed of very expeditiously within the maximum

number of days estimated. I notice a lot of people here, however, and I want everybody to feel that all the testimony necessary will go in, but if you think we are going to discuss the financial rights of all parties involved, it is beyond the scope of this inquiry. All we are interested in is to find out or to determine whether there is an insolvency in the case and whether Mr. Hamilton is a member of the partnership that is insolvent. I am not here to give back [4*] to anybody any money invested with anybody, because that is not my province, and when I make my findings, if I make a finding that Mr. Hamilton is not a member of the partnership, then the litigation ends, and if I find he is, then it goes back to the Referee in Bankruptcy for further proceedings, because that is what the referee is for. The only reason this trial takes place before me is because originally a jury was requested and a trial by jury cannot be had before a referee. A referee can hear a matter, but not with a jury. Nevertheless, when the jury was waived I decided to keep it to decide this particular issue, more so because the referee did not feel he could handle the matter and sent it to me to take over. So I want everybody to understand what we are here about and want everybody to know that this case has to be disposed of very expeditiously, and I have no sympathy with any of the motions that will seek to determine this on a shortcut. It has to be decided on the merits. That is why I continued every motion on the calendar to the present time. I want evidence on the merits and I will dispose of all of the matters with

one judgment. That applies to both the motions by the plaintiffs and the motions by the defendants. With that, we can proceed with the case. I do not want a statement of the case because I have heard so much about it already. So call your first witness, and let's proceed. [5]

The Court: What is the materiality of that? We are not trying a criminal law suit here. We are trying a simple law suit. This isn't the first one of this kind that I have tried. I have tried a lot of them. I know the temptation there is, especially when your clients are sitting in the court room, who were investors, to air everything in court, but this is no place to determine anything except the simple proposition: Is Mr. Hamilton a member of this partnership, and is it insolvent? Otherwise I am not interested.

Mr. Slate: This is offered to show the complete cooperation that existed between Mr. Brunson and Mr. Hamilton in all matters, even extending to that matter.

The Court: That does not make any difference, the fact that he appeared in the District Attorney's office. That does not prove partnership.

Mr. Slate: I will withdraw the question.

Mr. Willard: I have been sitting here and listening carefully, and all the testimony introduced so far will establish if, by chance, Hamilton is a partner, Williams is also a partner. [47]

The Court: That isn't the point they are talking about. Besides we need not discuss now the effect of the testimony. We will judge that later on. If he is, then there can be further proceedings to tie him in later on. You always have a right to bring in others into a partnership, if it is shown that they are. The referee can hear any tie-in proceeding later on.

I want to say this, so that you will know I do not intend to keep this proceeding before me except for the purpose of this trial and to determine this issue. I am not going to take the refusal of any referee to handle this matter. You see, I have not discharged the referee. This matter is still before the referee for all other purposes. I have not discussed the matter with him, and as I told you when first you gentlemen began to bring matters before me, the referee had not even consulted me, whether he would take it or not, and I did not care to talk to him; that I took the position to avoid him for the present, because you gentlemen, in the language of the street, seemed to have gotten too hot for him, and that has continued to the present time. So I am going to cool you off, and when you are cooled off, I will send you back to the referee, whose job it is, and who is paid by the government, to administer estates. Our job is to try law suits, and the administration of the estate is not the province of a judge, unless [48] he chooses to do so, and I do not choose to in this case. So after I decide this one matter, then it will go back and all further proceedings will be had before the referee, and there

will be no transfer unless I am consulted in advance and have agreed to it. This is notice to you all, and to the referee, or to any other referee, if he should wish to disqualify himself from further hearing of this matter upon any legal ground. So let's limit ourselves to settling this one issue, and not other issues.

* * *

The Court: You may know the fact. I don't know. It may or may not. If Mr. Hamilton sat in other than as an attorney, as a principal, and discussed with persons, say, representatives of the Board of Trade, presenting an assignment to creditors, that may have a bearing on whether by any actions he acknowledged he was a partner or had an interest in it. The rights of the parties, the contractual rights of the parties are determined by the law of the state in which we sit, and whether or not a man is a partner has to be determined under the law of California. And under the law of California it isn't necessary that you write an agreement of partnership. If, as a matter of fact, he participates in the profits of the corporation, even though there may be two or more in the venture and even though there [52] be no written agreement, the court may find a partnership actually existed, even though the man denies that it exists. That is the law which governs here, the law of California. So that the proof as to the existence of a partnership must be of a very broad nature——

Mr. Utley: I understand that.

The Court: —because of the nature of the matter. Therefore, admissions, participation, suggestions for control, and the hearing of complaints are just as revealing to a person who, like myself, is charged with the duty of finding or not finding a partnership as the actual splitting of profits. And if this were before a jury, I would have to instruct the jury that in determining whether a partnership exists they have a right to find and to consider what, if any, profits were divided, and also whether the man participated in the management, whether he had something to say about the policy, whether he had control over the other men whose names actually appeared and who—I don't mean to use the word disparagingly—who fronted for the men behind the facade. I am using it in the ordinary sense, and not in a disparaging sense. For that reason the scope of the inquiry must be broad. Therefore, while I am going to limit the inquiry to the particular issues, in proof of the particular issues I am going to allow all matters which are relevant to prove participation, which may make him a [53] partner, whether he actually signed his name to it or not, because we are not dealing here with a law suit between two partners. We are dealing here with the rights of third parties, that is, creditors, and the law is entirely different. What may not be sufficient to establish a partnership as between two partners, who sue each other to try to prove the existence or non-existence of a partnership——

Mr. Utley: I think I understand.

The Court: —may be sufficient when we are talking about the rights of third parties as against those two. An entirely different type of proof is required. If you want to determine what is required under the law of California, all you have to do is to go to the Blue Book to see what is and what is not necessary to prove partnership. For that reason many of these incidents which would have no bearing if Mr. Bunch and Mr. Brunson were suing Mr. Hamilton in a civil suit of a type which can be brought between partners, such as a dissolution of partnership, or the like, or for an accounting of profits, then that type of evidence would be insufficient to establish such a relationship, but it might be ample in a suit like this, which is a suit by creditors to hold a man to responsibility as a member of a partnership.

Mr. Utley: I think I understand the law as to partnership, your Honor. [54]

The Court: I know you understand, but I want you to know that I understand it, too.

Mr. Utley: I know that.

The Court: So that when we talk the same language there will not be any time wasted.

Mr. Utley: I know, but to discuss all that might be said about an assignment to creditors might take us through a lot of useless conversation.

The Court: No. You know my method. I do not allow useless conversation in my court. You are trying a case in my court without a jury. After all, I have developed some technique in my time as a judge. This is my twenty-first year as a judge,

so you, gentlemen, ought to know by now that I do not allow any wild goose-chase. So long as we do not have a jury, I will say this, that what a man says when he participates in a conference as to assignment to creditors may be very important to show in what capacity he appears. If he isn't a partner, he has no business there unless he is an attorney. If it appears he is an attorney, then, of course, the inquiry might be made, and even then he may claim to be an attorney, but some statements may have been made there, in his presence, showing he received certain profits or somebody might have said he is a partner, or may have said to him, "You are in this deal, too," and his answer to that may be very revealing, and [55] would certainly be an admission. You can base a partnership for this purpose upon an admission of participation of the type I have already enumerated. I don't know what this is going to be.

Now, don't start closing your brief cases, gentlemen. I never look at a clock here. We are not ready to quit yet. We will make up for the few minutes I took this morning to bring myself up to date.

* * *

The Court: All right. Step down. This is a good time to stop so as not to break the continuity of the cross-examination.

Mr. Hamilton: At this time, if your Honor please, as a member of the bar, and not represent-

ing myself, may I have the courtesy of addressing the court on behalf of clients of mine?

The Court: In what manner?

Mr. Hamilton: In this manner, that all these witnesses here are clients and friends of mine.

The Court: I see.

Mr. Hamilton: Dr. Hillman here is a very busy dentist, and it is costing him approximately \$100 a day to be here. All of these other people are in business, and they have been [67] subpoenaed here for reasons which your Honor will later find out, without any comment from me. But they are losing time, and can it not be agreed upon at what hour they expect to call these people, so that they will not have to remain, but can be here at that time and save themselves from unnecessary loss?

The Court: I cannot tell at the present time what range the testimony is going to take. Ordinarily, where professional men are involved, I try to accommodate them, especially if they are experts. I don't know why they are subpoenaed. I cannot determine whether their testimony is material at the present time. All I can do is this: As soon as I find out the range the testimony is going to take, I will know much more definitely whether these witnesses can be excused. What is this dentist called here to testify about?

Mr. Slate: Your Honor, he put considerable money into this affair. The professional men, in particular, who telephoned me have been put on call. I put my card on each subpoena for that purpose, and as to the professional men, I arranged

with some of them to be on call. Some of them, like Dr. Hillman, would promise nothing, and all he said was he remembered nothing whatsoever as to who he put the money in with, and I didn't feel we could rely upon his being here upon a telephone notice. [68]

The Court: What bearing does the fact that the man invested money have upon the partnership? You may sit down now.

Mr. Slate: To prove how the funds were taken from the investors and given to Mr. Hamilton. We have a list of items here, of approximately 60 individual and separate items, most of them involving these people who put their money in, and to show the partnership between Mr. Hamilton and Mr. Brunson. As your Honor knows, we have had a terrible time to get this list.

The Court: The question of how that was put up is not material. It is what he did with it as to the partnership.

Mr. Slate: We have had no opportunity to examine the investors as to the representations made, whether they ever heard of Deon Bunch or Brunson. We didn't subpoena all of the investors, but only some that we thought would be particularly good witnesses. Of course, if the court feels it is not material, we will not raise any objection to the dismissal of some of them.

The Court: I will tell you this: The only way I can do that is if you put on a sample witness. If you put one of the witnesses on to testify as to the circumstances, then I could determine whether that

has any bearing. I presume counsel might be willing to stipulate that certain moneys were secured for investment purposes from particular [69] persons. You should not answer that now.

Mr. Hamilton: I am not going to. I wanted to make the statement that on deposition all the record has been examined, every check and everything else, and the statement that he can prove partnership by any one of these people is an absolute falsehood.

Mr. Slate: We will wait, then, until we put on the evidence, your Honor.

The Court: We are not getting anywhere, you see. That is the danger of having you get out of character.

Mr. Hamilton: I am thinking of my clients.

The Court: You cannot have the proper viewpoint, being an interested party, and that is why you have able counsel to represent you.

So long as we have reached the cross-examination of this witness, and the cross-examination will take some time, I presume, I will deviate from the regular order and allow you to produce the one witness whom you feel will be the strongest one you have, perhaps the doctor, or just anyone you want to call. Then I will see from the trend of the testimony whether the testimony will reveal anything more than the books show, and that is that certain money was turned over to Mr. Hamilton for the purpose of investment. Then if that is all the testimony reveals, then in view of the fact that you have the

books and counsel are willing to [70] stipulate that the moneys were received in the amounts disclosed by the books, the rest of the matter will be absolutely immaterial.

Mr. Slate: If counsel will stipulate that the amounts were received through Mr. Hamilton, that is what we are trying to prove.

Mr. Hamilton: Your Honor, it has already been stipulated and the records show I received that money, and it shows where every penny went to.

Mr. Slate: That isn't true.

Mr. Hamilton: That is true, and you know it.

The Court: Now, you sit down.

Mr. Allen: May I make a statement?

The Court: Now you know why the referee didn't want to hear it.

Mr. Lane: If the court please, you will recall from reading the record——

The Court: We are not talking about that. That is past history.

Mr. Lane: This is right at the present time. You will recall that then and constantly from then on to this present time Mr. Hamilton has refused to testify to these things. Now he makes this bald statement here.

The Court: All right. We have Section 43(b) here, which is identical with Section 2055. [71]

Mr. Allen: It is Section 21 of the Bankruptcy Act.

The Court: No, I am not talking about the Bankruptcy Act. You know the Bankruptcy Act,

and so do I. But I know the civil rules, too. I am talking about Section 43(b), which says:

“A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party only upon the subject-matter of his examination in chief.”

That is identical in scope with the famous section 2055 of the Code of Civil Procedure, so that now you can call Mr. Hamilton and cross-examine him by leading questions as to any facts that are material to the inquiry. But once more I say that I am not interested now in the accuracy of the books. I am interested in just one thing, was he a partner, and the amount of money he turned over, and does it bear on the partnership? When I have decided that question, and when I find there is bankruptcy and that he is a partner [72] to it, that he is insolvent in his individual capacity, then I will send you back to the referee, and if that referee will not hear it, I will change the referee, I will appoint one who will hear it, and then all these people who did not get their money will have their chance in court to prove their claims. I am not establishing claims here. That is not the function of a judge.

Mr. Lane: But that is why we brought them in, to prove that Mr. Hamilton went out himself and made these representations, participated in it, and told these different people different things.

The Court: Those representations do not bear on partnership, and we are not trying a mail fraud suit, or obtaining money under false pretenses. A man may do so merely as a salesman, or for other reasons, and the fact that he represents that profits were made does not prove partnership. But I will allow you to put on the best witness you have.

Mr. Lane: The point is this, that is what the court has to pass on when we put on the witness. That is the very answer to this thing.

The Court: All right. Put on your witness, and I will see. I will see how much of a stipulation I can get for you. I can get stipulations that you can't.

Mr. Lane: That is fine. [73]

The Court: We are through all of the preamble, and all of those matters are finished. They wanted to put you in jail last week. They brought me an order to show cause as to why you should not be put in jail for contempt, and you wanted to put them in jail earlier in the case. So that is all over, and nobody is in jail. We are going to decide this on the merits. So we will adjourn at this time, and you decide which witness you want to put on the stand at 2:00 o'clock.

Mr. Hamilton: Your Honor, my wife has been subpoenaed, and she is not well, and we have three children and my wife has to take care of them.

Mr. Slate: If the court please, on that, we can prove many thousands of dollars went into this woman's own account, and she is one of the principal parties here.

The Court: But you are not trying to prove her a member of the partnership?

Mr. Lane: If the court please, Mr. Hamilton is the one we are proving a member of the partnership.

The Court: I don't know what his wife has to do with it.

Mr. Lane: We think she is a very material witness.

The Court: Then put her on first at 2:00 o'clock.

Mr. Lane: Will we put her on——

The Court: Just a minute. I will determine the order [74] of proof we are going to follow.

Mr. Lane: I thought a minute ago your Honor said to put on the best witness we had.

The Court: I have changed things. She is not an adverse witness because you do not charge her as a partner.

Mr. Lane: I would suggest this, your Honor: If she wants to be excused——

The Court: I am going to bring her back at 2:00 o'clock, and you will put her on then, or excuse her. I am not going to have you bring in a lot of people on the chance that they might be witnesses.

Mr. Lane: Well, let's take that up at 2:00 o'clock, your Honor.

The Court: There is nothing to take up at 2:00 o'clock on that. I have already determined that you will call her as a witness then. Otherwise, I will excuse her.

Mr. Lane: Very well, your Honor. That will be at 2:00 o'clock?

The Court: At 2:00 o'clock.

(Whereupon, at 12:40 o'clock p.m. a recess was taken until 2:00 o'clock p.m. of the same day.) [75]

Los Angeles, California,

Tuesday, June 29, 1948. 2:00 P.M.

The Court: All right, gentlemen, call your witness. As I stated this morning, we will defer the cross-examination of Mr. Williams so as to allow you to call Mrs. Hamilton, if counsel desires, so that she may be excused. If they do not desire to call her, then you can call one of the sample witnesses, so that the court may determine whether all these persons who are here to testify as to certain representations are material witnesses or not.

Mr. Lane: May I make one statement of explanation, your Honor, in regard to the other witnesses who are here. It was our intention to call those as soon as Mr. Williams had finished his cross-examination, and, of course, we are willing to defer the cross-examination in order to expedite the calling of those other witnesses. They were witnesses we intended to call right after Mr. Williams.

Now, as far as Mrs. Hamilton is concerned, I would like to explain this, that the purpose in subpoenaing Mrs. Hamilton was to have her here, because we believe that she is a material witness to establish the fact of solvency or insolvency of Mr. Hamilton. We also had the further purpose that if the issue was properly to be presented on the question of fraud, that she would be here on that. Now the court has ruled on that, and that point is eliminated. [76] But in regard to the establishment of solvency or insolvency we believe that she is—pardon me. Let me put it this way: we believe she may be a very material witness.

The Court: All right. Put her on. We have deferred the cross-examination of Mr. Williams, so put her on right now.

Mr. Lane: All right. Now, may I state this, with due respect to the court's suggestion, if you wish to put it that way, about the order in which we put on the witnesses, we believe that it would be extremely prejudicial to the orderly presentation of our case to put on Mrs. Hamilton at this time, and therefore, if the court please, I desire to object on that ground, that it would be extremely prejudicial.

The Court: Would you state why it is prejudicial, when I am trying this case without a jury, and I can hear testimony in advance?

Mr. Lane: Yes, I will. We feel that it is necessary, in the orderly and proper presentation of our case, to put on Mr. Hamilton first and to elicit from

him certain answers to certain questions before we put her on. Now, whereas the court's decision is, which you will understand, that the burden is on us to present the case.

The Court: I understand, but I am not running a game here. I am running a court of justice. I am not running [77] a game of skill here, to determine which is the most skillful among counsel. If you have read any of the opinions I have written, you will see that I have said that a hundred times in the last 20 years. The object of the court is to achieve justice under the law, and not to countenance a game of skill, and I reserve the right to tell counsel that. I will excuse her now, subject to call. Subject to call, you understand?

Mr. Lane: In other words, I would like this understood, if the court please: It is embarrassing to me and to my associates to have to disagree with the court in any way.

The Court: It isn't embarrassing to me.

Mr. Lane: Very well.

The Court: I am just stating my grounds.

Mr. Lane: That is right.

The Court: And you have a right to state your grounds to me.

Mr. Lane: That is right.

The Court: But we are not running a game here. We are running a court of justice, and I have a right to tell you, when representations are made to me and when a witness is here, that you cannot put her on the stand as an adverse witness. You have

to put her on as your own witness, and you must know before you put her on what she is going to testify to.

Mr. Lane: We do, and in that respect, your Honor, [78] knowing what she will testify to, we are in the position of having to decide whether we will put her on at this time.

The Court: All right.

Mr. Lane: And I feel, and I would like the record to show, that we believe that it would be prejudicial to the presentation of our case to put her on before we call Mr. Hamilton. We will abide by your ruling, of course, your Honor.

The Court: Let the record show that the grounds advanced I do not consider to be prejudicial. The witness can be examined at any place. As a matter of fact, it would be much better to have her now, from a tactical standpoint, because she will not have heard what Mr. Hamilton would testify and would not likely be consciously or unconsciously influenced thereby. Because the woman is not in good health, I want to be satisfied of the good faith of counsel in calling her, and order that she be examined now.

Mr. Lane: Well, I don't know that she is not in good health.

The Court: I take it Mr. Hamilton is a member of the bar, and when he makes the statement that I have the right to rely on it, unless you go on the stand and state she is not. Besides that, a woman who has children to take care of has a right to be called, be examined, and then excused, so [79] that

she can go to her children and not have to wait around here for three solid days.

Mr. Lane: The witness I will call, then, your Honor——

The Court: No, you are calling Mrs. Hamilton. Otherwise I will excuse her.

Mr. Lane: I thought I made it clear, your Honor——

The Court: Do you say you decline to call her now?

Mr. Lane: Yes, that is right.

The Court: You decline to call her now. Very well. Mrs. Hamilton, you will be excused. However, if I decide you should be needed and decide that counsel is entitled to call you again, the clerk of this court, Mr. Childress, will call you.

Mr. Childress, just rise and call the lady's name, so that she can recognize your voice.

The Clerk: I don't know her first name, but I will say "Mrs. Hamilton."

The Court: Will you speak your name, Mrs. Hamilton, so that if he calls you by telephone he will know who it is.

Mrs. Mary E. Hamilton: My name is Mrs. Hamilton.

The Clerk: Your first name, please?

Mrs. Hamilton: Mary E. Hamilton.

The Court: Now, you understand I am excusing you at the present time, with the understanding that if the clerk of this court identifies himself by name and tells you you are [80] wanted, that you

will come immediately—I mean within a half hour or whatever time it takes you to get to the court room?

Mrs. Hamilton: That is correct.

The Court: Then you may be excused.

Mr. Lane: Thank you, your Honor. Now, I would like to state this, that so far as any witness that can be called on the telephone, it is perfectly agreeable that he leave, with the understanding he is subject to call.

The Court: I am not making any orders about call on the telephone except as to Mrs. Hamilton. I am just making the order with reference to her.

Mr. Lane: But I wanted it clear that we are perfectly willing to follow through in that way.

The Court: That isn't the point. I am not interested in what you are wanting to do on that. I have already indicated that you appear not to be willing to do anything except to follow your own ideas, and so I am exercising my own prerogative in running this court.

Mr. Lane: Then I understand, your Honor, at this time——

The Court: I want you to bring on the other witness whom you are going to use as representative of the group which you say you are going to put on. If you want to put on any witness as to why you don't want to go ahead, go ahead and do it.

Mr. Lane: No, we intend to.

The Court: Call your witness. I have already indicated I do not think these witnesses can testify

to anything that is material in this case. I am not questioning your right to bring them in, because you cannot tell in advance——

Mr. Lane: That is right, your Honor.

The Court: —what the court is going to rule. You may have an erroneous conception of the law of evidence. Many lawyers do, and lawyers of much greater experience than you have had.

Mr. Lane: I admit I did have a misconception.

The Court: So I am not criticizing you for bringing them in.

Mr. Lane: That is right.

The Court: But you having brought them, and it having been called to my attention that you did so, I exercised the prerogative, which is mine, of changing the order and asking you to produce them at this time, so that this group of witnesses, who have no interest in the case unless their testimony is material, may be on their way.

Mr. Lane: I just want the record to show that we intended to call these witnesses right after Mr. Williams anyway, so that it isn't actually changing the order, because they would have come in at this time. The only thing is the court is obliging them by deferring the cross-examination. [82]

The Court: Yes, I am. I am always glad to accommodate outside persons who have no interest in the law suit. That is the province of any court, not to tie people down in a room in a proceeding in which they are not interested. I thought they were spectators. That is the reason I made the state-

(Testimony of Dr. Raymond E. Donahey.)

ment this morning, because I know in all of these cases where there are investors present, a lot of persons come in thinking that it has something to do with their claim, and that is why I made the statement, out of long experience, believing that all these persons were merely spectators who might think that I am going to give them back their money that they have invested.

Mr. Lane: Out of your pockets, you mean?

The Court: No, no. I am talking judicially.

Mr. Lane: I will call Dr. R. E. Donahey.

* * *

Excerpts from testimony of:

DR. RAYMOND E. DONAHEY

Direct Examination

Mr. Slate: There are no further questions of this witness.

The Court: Any questions, counsel?

Mr. Utley: At this time, your Honor, we move to strike the testimony of the witness and the exhibits, to wit, No. 2, 3, 4, 5, 6 and 7, on the ground they are wholly immaterial to prove or disprove any issues in this case.

The Court: I will deny the motion. Do you want to ask any questions? [92]

Mr. Utley: Certainly, there is nothing there that tends to prove or disprove a partnership.

The Court: I have something in mind. I can't

(Testimony of Dr. Raymond E. Donahey.)
tell you yet. You will have to use your own judgment.

Mr. Utley: No questions.

The Court: All right. I will ask you a question.

Q. (By the Court): You read these letters, did you not? A. Yes.

Q. In those letters and the receipts it is stated that he has deposited this money as your agent?

A. That's right.

Q. And that you were gambling on futures; isn't that true? You don't want to use the word "gambling." Mr. Pauley uses it, and he is a very distinguished gentleman in California. He admitted he made \$1,000,000.

A. We were wagering.

Q. You were wagering. You were wagering on futures. There is a letter there, I think it is No. 6, or No. 7. Let me see the last exhibits, particularly the one which said no other understanding was had or statements were made other than those which are set forth. I think it is in No. 5. Here is the clause here:

"There is no other understanding—written or verbal—between us arising out of this [93] transaction or any extension or substitution therefor; and if you carry out the instructions contained herein, you are in no manner, shape or form to be held liable, either now or later, for the money hereinabove referred to as given to you, as you are acting entirely as my agent and not otherwise."

(Testimony of Dr. Raymond E. Donahey.)

That was a typewritten form which you signed and sent back to him; isn't that true?

A. That's right.

Q. In duplicate?

A. That's right.

Q. He kept the original, then, and he returned this carbon copy? A. That's right.

Q. With his receipt on it?

A. That's right.

Q. Now, is that statement correct?

A. That statement is correct.

Q. No other representations were made to you orally as to the transaction?

A. There are two transactions there.

Q. I mean this one check?

A. That's right.

Q. The \$6,000? [94]

A. That's right. There is another transaction.

Q. The other transaction is the \$2500 that was returned, and the letters explain that?

A. Yes.

Q. Was there anything else said other than contained in the letters on the first transaction?

A. No, nothing other than contained in the letters.

Q. In other words, you put up the money under the conditions disclosed there?

A. That's right.

Q. And you understood at all times that money was to be invested? A. That's right.

(Testimony of Dr. Raymond E. Donahey.)

Q. On the chance that the market in eggs would rise and a profit would ensue, and you would get 20 per cent, and Hamilton and his associates in the deal would get 20 per cent; is that right?

A. 20 per cent.

Q. Isn't that right? I am not trying to confuse you with respect to your prospective profits.

A. That is right.

The Court: I want to tell you you are living right up to pattern. Doctors and dentists go into these deals.

The Witness: They are suckers, right on top of the list. [95]

The Court: I didn't say that.

The Witness: No, I know that.

The Court: Judges never get into this type of thing because they haven't enough money to spare. They have to raise a family on a salary; unless they have been on the bench and retire and capitalize on any reputation they make. But real judges, who stay on the bench, and not men who have been there and gone into private practice do not get involved in this type of thing.

Mr. Lane: There are a couple questions that I want to ask further, your Honor.

The Court: All right.

Q. (By Mr. Lane): These letters you signed, addressed to Mr. Hamilton, were prepared and presented to you by Mr. Hamilton?

A. That's right.

(Testimony of Dr. Raymond E. Donahey.)

Q. In other words, those are forms that he had prepared and delivered to you, and asked you to sign them? A. That's correct.

Q. And you signed them, as they were?

A. That's right.

The Court: I thought that was plain from the answer.

Mr. Utley: I thought so, too.

Mr. Lane: That is all.

The Court: All right. Step down.

(Witness excused.) [96]

The Court: Gentlemen, I have this thought in mind: If you will stipulate that the testimony of the other witnesses whose names will be given would be substantially the same, and assuming that that is the fact, then I will take their names and put their names in the record under the stipulation; and rather than strike the testimony, I will leave it in, and then you can argue its effect when all of the evidence is in. At the same time we would not be leaving a void in the record by striking it out and run the chance of somebody disagreeing with me later on, assuming that the question arises, and having to go over the same thing again. As it is, by leaving it in the record, you can contradict it insofar as it needs contradiction.

I may say for the record that so far as these papers are concerned, they contain no statement as to any relationship between Mr. Hamilton and

others. They merely refer to Mr. Hamilton as participating in the profit, and mention Brunson and Bunch as the persons to whom the money is to be paid.

Mr. Utley: We are willing to stipulate that these other witnesses, if called,—

The Court: I am assuming not all, but some would testify. You can designate them, and then that you will so stipulate. Then the evidence will remain, as I have already denied the motion to strike, and Mr. Utley need not repeat the motion now, but then it will be left for legal argument at the conclusion of the case, as to what, if any, inference may be drawn legitimately from this testimony.

Now, if you want time to consider that, I will declare a short recess, because we ought to dispose of that, and then we will go back to the cross-examination of Mr. Williams.

Mr. Lane: Yes, that will be very good.

The Court: All right.

(A short recess was taken.)

The Court: All right, gentlemen, what is the status of the stipulation?

Mr. Lane: We will stipulate that this list containing 28 names are the ones they say will testify the same as the doctor has testified to, excepting that the amounts of investment are different.

The Court: That is right, are different, and reserving the same objection already made.

Mr. Allen: Reserving the same objection already made.

The Court: Very well.

The Clerk: Shall I read the names, your Honor, and have the witnesses excused?

Mr. Lane: I don't think it is necessary. They can all be excused, including the bank witnesses, and their names are not on there. There is no use of keeping the bank [98] here.

The Court: Then you had better state the persons who are not excused, and the remainder may be excused unless they want to remain to hear the case. I will read the list for the record, if I may have that.

(The list was handed to the court.)

The Court: It is stipulated that the following persons, whose names have been given to the court, would testify substantially in the same manner as the witness who just testified, Dr. Donahey, except that their investments were in different amounts.

I will read the names and the amounts, or I will give this list to the reporter to copy, and those that are scratched out will be left off. There are 29 names, and No. 2 and No. 8 have been scratched out. [99]

* * *

Mr. Allen: Mr. Perryman, Mr. Redpath, Mr. Worthman, Virginia Kerr, Dr. Crawford, Sam Campbell, Nellie Fath, Mathilda Riggs, Mr. Mires, Mr. Pressler, Arthur Smith, Tom Rockwell and Leona Rockwell, and Mr. Hamilton's son, Wilbert H. Hamilton, are here, too.

The Court: What about those?

Mr. Lane: It will be all right to let them all go except Virginia Kerr, and perhaps she can be where we could call her.

The Court: We can conclude the cross-examination this afternoon and you can bring her back tomorrow and put her on.

Mr. Lane: She was Mr. Hamilton's secretary. She could be called on the phone.

The Court: All right.

Mr. Willard: What is the position as to these last witnesses? Are they subject to this same stipulation? What about the fourteen last called off?

The Court: We haven't decided on that yet. Do you want them on call, or just the secretary, or what?

Mr. Lane: We would like to have them on call, if we need them. I don't anticipate that we will, but we might.

Now, in regard to Virginia Kerr, I understand she is not Mr. Hamilton's secretary now, but if she can be on call, [102] why, we can call her if we need her.

Mr. Willard: I think your Honor might ask as to these fourteen people: what do you expect to prove through them?

The Court: Yes, if you might indicate the nature, we might do that, to save time. Also, I want to say that I am not going to stop the trial in order to get witnesses who are on call.

Mr. Lane: Yes.

The Court: Somebody has to be discommoded, and I do not want to have anybody get the impression that this is a country club where you can leave your name and you are called. People have to be discommoded in order to come to court, but I don't want to discommode too many at one time, if we don't need them. That is my only object. We have to be reasonable men.

Mr. Willard: We also have to consider, your Honor, the timing of this case, because, after all, we are now at the end of Tuesday afternoon, and we have had notice that we must finish by Thursday night.

The Court: Yes, this case is not going to last beyond Thursday. We will keep longer hours than we are today. Unfortunately, I have had to dispose of some matters and I have had to work in chambers. I haven't left my chambers since this morning. Fortunately, I don't eat any lunch.

Mr. Lane: Well, if the court please, it may or may not [103] be necessary to call them, depending upon Mr. Hamilton's testimony, but we wouldn't have time to call all of them.

The Court: The point is not to have all of them come back. Are there any of those that you are going to use tomorrow?

Mr. Lane: So far as we know, we won't use any of those, probably, because we can probably establish what we want when Mr. Hamilton takes the stand. That is with the exception of Virginia Kerr.

The Court: All right.

Mr. Lane: Now, as to the others, if we should need them, we can get them by telephone, and I am sure they will co-operate.

The Court: All right. When do you want Virginia Kerr to come back here? Where are you, Miss Kerr?

Virginia Kerr: I am Miss Kerr.

The Court: Where are you employed?

Virginia Kerr: I am employed on Vermont Avenue right now.

Mr. Allen: We are willing to put her on out of order and be through with her. Then we have nothing to worry about.

The Court: I tell you, you come back tomorrow at 2:00 o'clock. If they haven't reached you by that time, I will make them put you on anyway. The others will be excused [104] with the understanding that if you are notified by the clerk that you are needed, you will come here. Is that correctly understood by every one of you, that if the clerk calls you, and you have seen him and heard his voice,—if he calls you and tells you you are wanted, that you are to come down as quickly as you can? With that understanding, you are excused, and Miss Kerr is excused until tomorrow afternoon.

A Voice: Your Honor, my wife and I were subpoenaed, but we haven't received any fee for testifying.

The Court: The government has nothing to do with that. Counsel has to advance the fee, and if he hasn't paid you, you will have to talk to him.

Apparently, you didn't demand a fee. You should have demanded your fee at the time.

The Voice: We didn't know about it.

The Court: All right. You may proceed.

Mr. Lane: We will go on with the other witness.

The Court: My clerk calls my attention to the fact that while I have given the names, we haven't got the stipulation. There is no stipulation as to these fourteen additional names. Now, let's get that. Gentlemen, is it so stipulated?

Mr. Lane: Yes.

Mr. Allen: Yes, reserving the rights that we stated.

Mr. Lane: That includes the written documents; in [105] other words, the letters that were introduced.

The Court: That is right. Similar letters?

Mr. Lane: That is right. [106]

* * *

The Court: Let us go on and do the best we can.

Mr. Slate: If the court please, that brings up a matter which I think we ought to take up at this time, in view of the court's statement just after adjourning and just before leaving the bench, when you made the statement that if necessary we would proceed with night work in order to finish this case, because it had to be finished tomorrow, otherwise you would declare a mistrial.

The Court: No, I didn't mean that. I did not

state that for the record. That was a slip of the tongue. I did not intend——

Mr. Slate: Later you did correct that.

The Court: I had in mind this is not a jury case in which you cannot continue it. What I meant to say was that the case would be continued to a later date after my return. That is all I meant.

Mr. Slate: In view of that, I would like to say this, if the court please, that I feel that I do not believe the court is fully apprised of the—you might say the immensity of this case.

The Court: I am not interested in any argument on the immensity of the case. I announced yesterday when we began this case that all I have to give to this case is three days. After that time if you gentlemen felt that it could not be tried, you should have said so. That is customary. It is customary in my court, and this is not the first instance where a judge, because of previous engagements made a long time ago, has to go away. I was requested as early as March of this year to go to San Francisco to help there in work on a special case, and I was assigned for that purpose. I am not going on a vacation, and I am going, so that I cannot give you more than today and tomorrow. If you are not finished, then the case will have to be continued until after my return, and we will take up where we left off, and that is all there is to it. If you feel that possibly I may have forgotten the evidence, you can call my attention to it in oral arguments or in briefs that may be filed, or give me a transcript.

This is not the first time that that has been done; many cases of that have taken place. We have a very busy court. At times, for instance, cases have been continued because the judge had to go into criminal work, and that work cannot be continued. So my statement to you is nothing unusual.

Mr. Slate: No.

The Court: So we are going on and go as far as we can.

Mr. Slate: There was one other statement you made, and of course that is clarified now. You made the statement that you would declare a mistrial or send it over to some other judge.

The Court: Oh, no, there is no possibility of any other [211] judge trying it.

Mr. Slate: All right. That is, as I say, clarified by your remarks now.

The Court: There is no other judge to try it. Furthermore, I would not waste three days and send it to another person. There is no judge to try it. It is customary for us to transfer cases from one to the other, but last week while I was trying a very important trademark case which requires the writing of an opinion, there was filed in my court a petition for habeas corpus, that had to be heard immediately, because there was an officer from Colorado waiting to pick up this prisoner and take him to Colorado. I went to Judge McCormick and tried to have him find a judge who would take the matter. There was no judge available and I had to hear it and do the best I could. In other words,

we are in a very busy district. My calendar is current, but the only way I could keep it current is by cooperation between counsel in saving my judicial time. Now you are wasting 15 minutes of that time for nothing.

Mr. Slate: I would like the court to hear my statement, because I have another point to call to the court's attention.

The Court: I don't want any further statement. The case is going too slow.

Mr. Slate: You mean then I may not even state the point? [212]

The Court: What is it that you wish to state?

Mr. Slate: I think it is very material, your Honor. I wanted to point this out, that in the first place this lawsuit will take about four weeks to try.

The Court: It was not set for a four-week trial. You informed me that it would not take over two or three days, when a jury was waived.

Mr. Slate: Now, if the court please, I did not do that, because, for your information, I have never appeared before you.

The Court: Well, counsel, when I say you, I mean other counsel in the case.

Mr. Slate: But not on my side of the case.

The Court: This case was continued. When we first agreed on the setting, it was understood that if a jury was waived the case would not take very long, and the setting was continued to a definite date. I don't know, I can't remember why it was continued from that time.

Mr. Slate: I would like the record to show that it was continued at the request of our opposing counsel and over our objection.

The Court: All right. There is no further statement. This case will go on until I decide what is to be done. This court was never informed that this case would take four weeks; otherwise I would not have taken this trial. I made the statement [213] when we began yesterday that this case is set down for three days, and that is all I can give it, and at that time no statement was forthcoming on your part.

Mr. Slate: That is right, your Honor.

The Court: I do not propose to waste a day and a half I have taken up with this. If you are going to suggest a continuance, I will not give it to you.

Mr. Slate: I am not suggesting a continuance. I haven't had the chance to make the point that I want to make, and that is, I wish to call to the court's attention what I believe to be a very material fact which should be taken into consideration, and that is this, if the court please, that there are in excess of \$100,000 in voidable preferences here. One of the persons who took a substantial voidable preference has died, two persons have died that are involved in this bankruptcy. Now, you spoke today about continuing the matter and I assure you that I believe that I am correct that is the first time anything was said about continuing it clear over to the latter part of November.

The Court: Vacation month has come. We have made a rule recently that no regular calendar would be held in July. If I had not promised and did not have the designation to go in July I would go on with the case. We cannot get a trial in any other except the criminal department in July. Under the rules you are supposed to inform me in advance. I have [214] been holding the time for the last two weeks, and I have had no statement, and I informed you before that I was going away.

Mr. Slate: That was our first knowledge when I told you.

The Court: But this case was not set for four weeks and I did not know it was a four weeks case. If I had known that it would be a four weeks case, that would involve making proper arrangements.

Mr. Slate: Now, if your Honor please, I would like to point this out: The auditor's report prepared by the CPA is 224 pages and it consumed eight months of the CPA to prepare that report. Now there is 224 pages of that eight months CPA report that was paid for out of the funds borrowed by the petitioning creditors here. As I told you, there is in excess of \$100,000 in voidable preferences which are being scattered and getting away, your Honor. We didn't know this was to go over until the latter part of November, and there was no way of knowing. The sum of \$25,500 was paid out directly by Hamilton on September 18, 1947, and this action was filed a few days later. In other words, certain letters show that he paid that out because he knew that our action had been filed.

The Court: Well, all right. Have you any motion you wish to make?

Mr. Slate: No. [215]

The Court: Do you want to make a motion or what do you want to do?

Mr. Slate: I wish to say this further, that out of that there was \$2483.35 which Mr. Hamilton paid directly into the private trust account, and we have 11 witnesses that we know of that will be called in addition to Mr. Hamilton, and when I tell you that it will take four weeks, I think that is a very accurate statement of what time will be taken.

The Court: All right. Have you completed?

Mr. Slate: No, I have not, your Honor.

The Court: What is the idea of taking my time up for an argument? Do you have a motion in mind?

Mr. Slate: I also wish to state this additional point, your Honor—yes, I do have a motion in mind.

The Court: What is it, may I ask you?

Mr. Slate: First my motion is this, that when you adjourned at the recess there you said you were either going to send this to another judge—

The Court: No, I don't think so. I would not send this case to another judge. Furthermore, there is no other judge available who will take this case. If this case is not completed tomorrow night, I will continue it to the earliest date I have on my calendar.

Mr. Slate: Very well. [216]

The Court: Just a moment. I called the calendar last Monday and set cases until the end of October. Those cases have preference, because I never was told that this case would take more than two or three days at any time. Therefore, we will take as much testimony as we can and it will be continued until that time. If you want to stipulate that the depositions may be taken of such witnesses as you may feel may disappear, I will agree to that, but I will not make any definite order until later on.

Mr. Slate: Now, the other point that I was coming to, Judge, I think is very material. That is this, that the Referee in Bankruptcy has refused to appoint a trustee. He has taken the position that he will not appoint a trustee in this case until after this matter has been heard. Now, it has been under him nearly a year. If it is continued over it will go over beyond a year. In that time, without the appointment of a trustee, I am in no position to go after these voidable preferences and I pointed out to you they are being scattered. So I submit, if the court please, that under the present circumstances we are suffering irreparable damage. I say that is demonstrated now on behalf of all creditors.

The Court: There is a method of reaching that. You can make an application for appointment of trustee and make a showing, and then if he makes an order refusing to do it, then [217] you can file a petition for hearing. While I will be gone, there will be other judges present here who are required under the rules to make an arrangement for such

a situation. I have been working day and night, long hours, in order to clean up this work. I was here until 12:30 last night working, not in this matter but in other matters that had to be gotten out, and I am surprised to hear for the first time that this case will take four weeks, and I state for the record that at no time from any statement was I informed, after the waiver of the jury, that this case would take more than three or four days. Had I known that, I would have set it and I would have cleared the calendar for that purpose.

Mr. Slate: I can only say this, your Honor, that I was not in town on the date that the continuance was got, so I don't know what was said. That is what I understood.

The Court: I have stated my views. We will go on and take whatever testimony we can, and then when we have concluded the day tomorrow I will consult with you as to what is to be done, and we will decide the date to which it is to be continued. I cannot be in San Francisco and here. I am entitled to a little vacation, and I have to be in Seattle early in September, because that is obligatory. There will not be a judge here the first two weeks in September except an outside judge, because it is obligatory on all of us judges to attend the Conference. The first time I will be back here [218] will be September 13th, and I have already set cases until the middle of October, I have a case set in November, and I have thought that in between I could put you in. But I would not disorganize 15 cases

in order to take care of a contingency of which I was not informed. It is the duty of the counsel to suggest to the court when the case is set, and the trial judge should be informed approximately of the time. It does not mean that the case is not completed because it takes longer, that is not the point, but we are reaching vacation and I have committed myself and have the order of the Senior Circuit Judge assigning me to San Francisco; I am supposed to be there tomorrow. Cases are already set. I arranged last week a pre-trial hearing to be held there. So it is humanly impossible for me to go on and finish this case, so the only other thing to do is to continue it until I am ready. I cannot send it to another judge, because there is no other judge available who could take it at this time. There is no judge who could try this case before November anyway, if I sent it to another judge. Besides the Referee in Bankruptcy will place a lot of burdens on me, and I assume that your remedy, if you need some intermediate relief, is to go before the Referee, because I told you before, both of you—I don't know which of you, I can't remember who was present, and if I remember one person, I don't remember if the other was present, because there is always one [219] on each side. Mr. Willard has not been present at conferences because he recently came into the case, and whether you or Mr. Lane were in the conference, I don't remember. One of you or the other was at every one of the conferences. I told you at the time

that this case still remains in the Referee for all purposes, that the only thing I have taken over is this, and you heard me state it again yesterday, and when I got through the only question I have to determine is whether there is bankruptcy and whether these acts of preference have been committed. Then the case will go back to the Referee for administering.

Mr. Slate: Very well.

The Court: I can't agree with your conception of the case, as to what you have to prove in this case. All you have got to prove is insolvency, and in this case that he is a partner.

Mr. Slate: Very well, your Honor. The point was that, I think your Honor will agree with me, that it was my duty to try to get the matter disposed of as quickly as possible.

The Court: I have not interfered with that duty. There has been no congestion of my calendar. The continuances were made at your request. I have not asked this case to be continued at any time.

Mr. Slate: That is right.

The Court: I declined last week to set a matter down because [220] it would have consumed some of the time scheduled for you.

Mr. Slate: Very well, your Honor. But, as I say, the point is that I was not casting any aspersions on the court, and I hope you didn't think so.

The Court: Well, I want the record to show in this case that at no time was I informed when this case was set originally at the present time that it would take anything like three or four weeks.

I made the statement yesterday I had only three days, and no statement was forthcoming on your part. If you had said to me yesterday morning that you doubted this case could be concluded in less than three or four weeks, I would have told you at that time that you would have to go to fall. But now that I have taken a day and a half and have clarified the issues, I don't want to waste the time that has gone on. We are going to work the hours I will designate, and then at the end of the hearing if we have not reached the end I will determine when we will hear the balance of the testimony. It may be they will stipulate to take the depositions of some of the witnesses who will testify, although you are entitled to some presumption that any conflict would be resolved from hearing the witnesses, because if you take it all by depositions then there is a record you can call attention to, whichever way I rule in this particular case. [221]

This has not been a pleasant case for me to try. I should say both sides have contributed to it. There has been so much feeling here that the Referee declined, without consulting me, to hear a lot of matters. I have to hear them and to act as peacemaker in the matter and to secure a lot of cooperation in the case, and I should not be put in the position at the present time as though it was the fault of mine that the case cannot go on. It is no fault of mine whatsoever. This case was set without any information to me at any time that it would take more than three or four days to try. So I will

say nothing further about the matter, and we will go on until I see we are ready to continue. I might defer my trip to San Francisco for a day at least if I felt that it could be concluded on Friday. I cannot get away from the assignment without disorganizing that District, and that is a part of our District. I am not taking a jaunt to New York to see the plays and try a few cases to have an excuse to be there, although I have an excuse to be there, I have a daughter in New York. I would rather go to New York myself, but I cannot go to New York, I have to help in the work of the District which is a part of our Circuit and a District from which we have borrowed judges to help us. It is true I could have refused, but I can't refuse now the assignment that I accepted in March, especially when counsel have been so neglectful of their duty to the court as not to [222] inform me of the length of time that this case would require. I jot down in every case the possible length of time it will take. Sometimes I underestimate, but it is inconceivable to me—I should say this was a case that would take three or four days, and I think it never ought to take three or four weeks. I have eliminated one issue through stipulation, but I am afraid you could not secure a stipulation from the other side stipulating what 28 witnesses would testify. Let's go on. [223]

* * *

The Court: All right, gentlemen. Have you reached any agreement?

Mr. Willard: No, your Honor. As far as our side is concerned, we are, as I stated before, wholly opposed to it, for the following reasons, among others: In the first place, in the month of April your Honor is perfectly correct, you stated very clearly that you could not see where this case should take over three or four days, and nobody contradicted you, and I think you mentioned something about the 1st of July being a date on which you would not be here, so there was no discussion on that. Your Honor is perfectly correct.

Now, at that time we waived a jury and we waived that, not in front of any other judge of this court, but before your Honor, and we do not propose to be transferred to any court except to your Honor. We are certain at least that we have expected your Honor to try this case. Yesterday you saw some 50 of Mr. Hamilton's friends and clients in this court room under subpoena. You saw 46 of them and excused 28 subject to a stipulation of their testimony. We have an action [242] here in which they say they want three or four weeks to try, and it is inconceivable to us, and it shows, as we have urged, that we don't know what they possibly could do with the time except to try to smear and throw some more rocks at Mr. Hamilton, which your Honor has very wisely attempted to knock out of this case. I don't think there is anything in the accountant's report, 240 or 2400 pages, which is going to influence this court in the determination of partnership. We have before us four petition-

ers. On the testimony already adduced, two of them are not clients and did not even know Hamilton, they are clients of Mr. Williams in a similar trust. One of them, Mr. McClyman, who is a very decent fellow, is now testifying, and when he gets all through, your Honor will appreciate that he invested the \$1,000 with Mr. Brunson's firm, that Mr. Hamilton had no connection with at all.

Another gentleman named Urie is the fourth petitioner. I don't think your Honor will ever see him in the court room, although I fondly hope that you will, because I have a few well-chosen questions I would like to ask that gentleman. I don't think he will be here for the asking.

The Court: Let us not cite your reasons. I just want your word on the matter.

Mr. Willard: That is a reason, and a further reason is that we have now arrived at a point in this case where I believe [243] it is of the utmost importance that it stay right with your Honor. Your Honor is reputedly, and so correctly so, a man who likes the technical side of the law, and there are technical points here. Realizing your Honor's capacity for that, we have joined in the waiver of a jury.

The Court: Thank you for the compliment. I merely wanted to show my willingness, in view of the fact that when we were talking off the record and as I was leaving the bench I said something about sending the case to another judge, and counsel immediately seized upon the possibility, and

I went on to tell them how under the rule it could be done, because I have no desire to try a particular case. So far as this is concerned, it is one of thousands which in 21 years I have tried, and one case may have more more interest than another, but ultimately it is just another case. I don't know Mr. Hamilton, except that he has appeared before me in my long career on the bench. As far as you are concerned, you only came in the case recently, you tell me you didn't appear. This young gentleman has appeared, but I don't know whether they have appeared before me or not. I don't know any of the litigants. I don't know any of the parties. To me it is just another lawsuit, and when counsel seizes upon an informal statement that I made to emphasize a point at that time, I wanted them to know that I am not particularly interested in keeping the case, if there is any legal method without putting them in the position of telling me that I must transfer the case, without swearing to an affidavit of disqualification, that for some reason I am prejudiced against their client, which of course they can do if they can truthfully swear to such an affidavit.

Mr. Willard: Your Honor, I was not seeking——

The Court: I was going to tell them that I would not stand on ceremony, if that is agreeable, and I will send the case out and let them start all over again, but I do not want to be put in the position as having intimated that I would send it, because, as I told them, this is the only rule under

which I would, if you both agree, then I will send the case back in there and assign the case back to the calendar and it will go into the hopper.

All right. There will be no agreement.

Mr. Willard: May I state, your Honor, that pursuant to your Honor's statement, one of the difficulties I am in is I have definitely planned to leave the city, under plans which cannot be changed, on Friday morning.

The Court: All right, let us talk about that tomorrow. Let us go on and see how far we can go anyhow, and I will try to find as early a date as I can in the fall. I cannot disorganize the calendars set for six weeks to shove this case in, because this case is not entitled to priority except on one condition. If counsel informed the court in advance that [245] it was likely to take not three or four days but three or four weeks, and we had started and continued and it had taken six weeks or a month, then of course once having started to try, they are entitled to go through, since counsel had not intended to do it at all. As a matter of fact, the same situation arose in San Francisco. When I was in Fresno in March of this year, Judge Rhodes informed me that the case I was going to try there would take three or four weeks. Counsel in another case, whose San Francisco associates were also to be in that case, because it was also an antitrust case, stated in open court more likely it would take three or four months. My assignment to San Francisco was for a month, and when I got

it I read it and I said if it is going to take three months, I am not going to quit in the middle of a case, and I know, of course, that it is going to be continued a long time, but I will stay as long as is necessary.

I admit counsel are not the only ones who made an underestimate. On the other hand, the case has no priority. Therefore, I will follow the procedure outlined. If you do not finish tomorrow night, then the case will be continued, and I am sure that counsel have enough ability to refresh my memory if in the meantime I have lost track, or it would not cost \$75 to transcribe the testimony other than the documentary evidence, to write it up so that counsel will have it and when they argue they can make sure that the testimony [246] of the witnesses is called to my attention.

All right, there will be no further, gentlemen. I am going to say nothing further and I don't want anybody else to say anything further about this. I will consider your suggestion, and if you have not finished by tomorrow, I will designate a date when the case is to be continued to. [247]

* * *

The Court: Gentlemen, let us get away from this idea that I am trying a question of fraud here. I am not trying [352] a question of fraud or anything else. I am trying to establish if there is a partnership and who composed it and if it is insolvent.

* * *

The Court: Maybe counsel will stipulate that those investors that you have are going to testify similarly to the manner in which some of the preceding ones have testified, to the effect that they made investments, and then there can be a statement to that effect. We already have a sample of one of the witnesses and we have another sample of the lady who just preceded. If that is the testimony, I don't know why we should encumber the record with a lot more exhibits, when the matter could be covered by stipulation.

Mr. Lane: He is not one of those groups.

The Court: Where is he? [434]

Mr. Lane: Mr. McClyman has apparently left, your Honor. He has been here for three days, right here.

The Court: Well, that is all right. This is a long case. He had the disadvantage that he was under subpoena and not discharged.

Well, have you any other witnesses?

Mr. Lane: That brings us to the place, your Honor, where we subpoenaed in these four witnesses, expecting to put them on, plus the cross-examination of Mr. McClyman.

The Court: You said you had altogether 11 witnesses. What were the other witnesses like?

Mr. Lane: Yes, but we didn't tell them to be here today, due to my experience on how fast we would get through this afternoon. That is entirely my fault.

The Court: All right. What are they going to

testify to? I am trying to see if we can get stipulations.

Mr. Lane: We don't intend to put on any more of the original investors, that is what——

The Court: What is the nature of the testimony that they are going to give? I want to know, in view of what action I am going to take in regard to the matter.

Mr. Lane: Your Honor, we are asking to produce Mr. Urie, who has not taken the stand, and we would like to have him testify concerning representations made to him. He lives in Santa Monica, and we had four plus the cross-examination [435] of Mr. McClyman.

Mr. Willard: I think the question that the court is concerned with is what is this man going to testify to.

The Court: Gentlemen, what I had in mind was this: As the case is going now, I cannot see any reason why this case would not be completed in a day, no matter how wide your cross-examination is, and in view of the fact that you gentlemen protested so vociferously at a long continuance you will have to have in the case, I am considering whether I can finish the case, in which event I might delay my departure for a day. After all, a day will not make much difference. I cannot see any three or four weeks remaining for this case.

And then, of course, after the facts are all in, ultimately Mr. Hamilton on cross-examination under 2055 or under our Section 43(a) is going to tell the same thing he would on direct, and then

in the Superior Court I used to have them stipulate that the testimony given by a man given under 2055 should be considered a part of the defendant's case, and let them make such addition as they desire. Under the circumstances I cannot see why the case would not be completed tomorrow, so far as the presentation of the facts is concerned, and in that manner I will have it all before me and you gentlemen can brief the matter, and, of course, I can read the briefs whether I am here or whether I am in San Francisco. [436] I am trying to accommodate you because of the situation in which I find myself, due to no fault of my own.

Mr. Slate: Your Honor, we want to get it through as soon as possible, and we would like to finish it tomorrow.

The Court: I cannot see why it can't be finished tomorrow.

Mr. Slate: Here is the reason: our further evidence has to do to a great extent with an audit that has been made over a period of eight months by a certified public accountant, and it took me about three weeks to understand the transactions.

The Court: Well, you don't have to explain that all now. Counsel, here is the point. The rule of the federal court is this—pardon me if I seem didactic; although it is over ten years since I taught in law school, I still retain the habit—but I am merely indicating what the law is so that you may be guided by it. In the law in the federal court we have a very salutary rule, and that is that sum-

maries of public accountants are received in evidence upon their being identified, providing the books, the originals are available so that your adversary can consider them. I cannot see why counsel under the circumstances cannot stipulate to the summary. They can stipulate what the checks show, what money went in, what sums of money and where they went, and then the question of the inference to be drawn [437] would become a question of law, because I don't want the accountant to be a lawyer, I like them to keep their province. As a matter of fact, we have great difficulties with them, it is a difficult job to keep them within limits, because they will talk at the drop of a hat about discovering a 10-cent error. Their work is trying to discover somebody else's error. So I don't see that it is necessary or that it would even be permissible for you to go through that and take a week to explain to me what is in it.

Mr. Slate: Your Honor, the report after it finally came from the auditor and which we have gone through finally with the auditor's help, we have found a series of transactions, one right after another, during this pertinent period, all tending to show partnership and that Mr. Hamilton was actually the dominant figure in the business known as Brunson and Bunch.

The Court: All right; but supposing they stipulate, without admitting the conclusions, stipulate that this is a correct summary of these transactions as of their appearance in the book—that is all I

will allow you to do—not that I will allow you to do, but that is all that is necessary as a factual basis. Then the question of analysis is one which is a matter of argument for you to address to me either orally or in writing, and is one to be determined after the evidence is in. What I want to do is to get all the evidence in so [438] that there will not be that hiatus, and then you gentlemen can brief it and I will read your briefs, wherever I am, and determine the matter and if I believe that I need additional oral arguments, I will set a time for the argument when I get back in September. I can set some Monday for additional oral argument.

Mr. Slate: Your Honor, most of this money, or not most of it but a large block of this money, did not go through the books, was handled in cash transactions, cashier's checks and actual cash given, and cannot possibly be explained through the auditor's summary. I feel we will want to show that these transactions were not legitimate.

The Court: If they were not legitimate, that is an inference to be drawn. Let us talk informally. Let's talk off the record and see what we are going to do.

* * *

The Court: Page 20. Well, I am at a loss at the present time to understand what counsel is attempting to do. This is a trial on the question of bankruptcy. Of course, a statement made by a person reputed to be a partner may be received in evidence, but this is not a deposition. This is an

examination before the Referee. This is a trial before the court and I just cannot see how the particular statement, by a witness who was not present, who as I understand is in the penitentiary, can be brought in on the trial of this cause at the present time. If that is material, it can be brought in upon a showing that these are statements made by him. Then, of course, you may offer the portion and they have the right to offer the entire thing, but I cannot see how a statement made by—who was that? Brunson himself? [445]

* * *

Mr. Slate: If the court please, you will recall when we were up here before, counsel stated that the records of Mr. Hamilton would be made available and at that time the statement was made by us that we intended to question Mr. Hamilton [458] when court reconvened. Now, he has seen fit not to bring any of his records here. This is a very involved transaction.

The Court: Well, of course, I did not make any definite order that they be brought.

Mr. Willard: I don't recall any such stipulation.

The Court: There was no stipulation. I think it was stated that they would be available but, of course, no time was fixed for making them available and, of course, now he starts an examination and as the need develops we can tell counsel to bring those papers called for.

Mr. Slate: Here is where we need them, right now. The first egg transaction was extremely in-

volved. There was money going in and out of various accounts and we need their records. Will the court instruct Mr. Hamilton to bring them and make them available?

Mr. Willard: Your Honor, the situation as I understand it is this: Under order of this court we made available every record we have had for photostating and examination. They have everything we have and presumably have the photostated copies. We have no objection to bringing in our records to support the ones they have photostatic copies of, but it seems that they might as well use the photostats and copies. Presumably they are true and correct. They got everything we know about. [459]

Mr. Slate: But counsel——

The Court: Just a minute.

Mr. Willard: May I conclude, Mr. Slate? Now, this egg transaction you are speaking about is clearly beyond any time where they attempted to establish any profits. The only purpose I can see for it is to show whether they made any profit on the deal and whether or not there was any existing partnership at that time. They have everything we have in our hands. I might say the egg transaction was very, very profitable, but you may have some ultimate theory as to why that became so.

Mr. Slate: I don't think counsel's statement is quite correct. It is my understanding that all of Mr. Hamilton's records are not made available. I know they were not available to us. The auditor tells us that he was permitted to see some of them;

some of them Mr. Hamilton would read across the table and he has not seen them, much less have photostatic copies. Others Mr. Hamilton said he would make available and didn't and made no explanation why.

The Court: Well, suppose you proceed and I will tell counsel to bring the additional documents here this afternoon.

* * *

The Court: Well, I think we can dispose of this matter, gentlemen, in this manner: As to any documents of which no photostatic copies are in the possession of the petitioners, if they will—in view of the disclosure of my order and there has never been any objection that there wasn't any, I am not going to do it over again. I have taken judicial notice here, and I have permitted it because we always like to render any assistance—I see that a stenographer from the District Attorney's office is present here and is transcribing some of the testimony. That is a legitimate——

Mr. Willard: Exercise of prerogative. [512]

* * *

Mr. Slate: Will the court instruct the witness to bring those records to court tomorrow? [525]

Mr. Willard: They have photostatic copies of them.

The Witness: They have photostatic copies of them.

The Court: What?

The Witness: They have photostatic copies of them.

The Court: I am not going to make any order at the present time. I think this is developing into such a wide expedition here that we are duplicating everything that was done. You will have to show me as to each specific thing that you don't have a copy of or that this wasn't available to you, because I am not going to take an accounting here, as I told you before. If you want an accounting, I will send you to a master. But, I have to determine, first, whether there was an act of bankruptcy committed and whether Mr. Hamilton was a member of a partnership, before you get down to an accounting, and the object of this trial is to take evidence from which the court can determine whether a partnership existed.

Mr. Slate: What we are attempting to prove——

The Court: I know what you are attempting to prove. You cannot prove it on cross-examination by this manner. You have this witness under oath. He admits the check and I am not going to tell him to bring in the canceled checks. You are going to be ordered to ask him only on such documents as you have now.

Mr. Slate: That is all I am asking. [526]

The Court: As you have now and as you have had, and I do not see the materiality of the check itself.

Mr. Slate: That is what I am trying to show, we are trying to show if Mr. Hamilton has an interest in that partnership.

The Court: All right. He has admitted the checks. Then, what other matters are material?

The way the check is worded is immaterial. You are not bound by this testimony, so what time you are taking now is just a lot of waste of time, unless you actually get some more facts, and the man is giving you the best he can the facts as to the checks.

The production of the checks is not going to show whether it is a partnership account or not.

I am making no further order until you show me the materiality of each one of these items.

I can see now why you think it is going to take three weeks. At this rate it will take three months and we will get nowhere fast.

Furthermore, I wish you would instruct your various witnesses that you have subpoenaed and those in the audiences not to write letters to me. A lot of people are writing letters to me complaining about something—asking what to do, asking me what to do about circular letters that McClyman is sending out, and that is absolutely improper. I send them back, those that I receive. And I wish you would inform them [527] that you are conducting the litigation and that it is improper for anybody connected with either side to communicate with the judge; if they want advice, to go to their lawyers and not write me letters asking me what to do.

* * *

Mr. Utley: Just a moment, your Honor. Your Honor, how could this possibly be material to any of the issues in this case? And I object to it on that ground. Whether he received it or didn't receive it would not show whether or not he was a

partner, it wouldn't show whether or not he was insolvent. It has nothing to do whatsoever with the issues in this case.

The Court: Objection overruled. He has answered in the negative. Overruled. All right.

* * *

Q. (By Mr. Slate): Mr. Hamilton, did you bring with you check No. 1610?

A. I didn't.

Mr. Slate: Your Honor, that is the check which he was instructed yesterday by yourself to bring with him this morning, and the check book showing the voucher for it.

Mr. Willard: No, your Honor, that isn't the fact at all. It is a check concerning which he testified and explained, \$82, and after he got through your Honor very pointedly said, and correctly, what is the use of producing checks and records when the man tells you what it is all about.

The Court: Yes, I said in view of his admission I did not think the presence of the check in court was necessary or would throw any light on anything.

Mr. Slate: What we really want to show there is that Mr. Hamilton out of his personal account paid a partnership debt. [621]

The Court: All right. You have his admission, what he did, and the check won't show any more than what it contains, and that is all there is to it.

Mr. Slate: Then, the court will not have him bring in that check?

The Court: You can argue that. I am not going to make any order in regard to that check.

* * *

The Court: Well, I have already indicated that is not the proper way to bring in the testimony of the person, but I am going to allow the question to be asked, if he heard the questions made. This is not an accusation that is being made where a man has to repudiate it. You don't prove a partnership that way. Furthermore, Rule 26 of the Rules of Civil Procedure distinctly provide for the taking of a deposition of a man in prison. Here is what it says:

* * *

Mr. Utley: Well, we make our motion to dismiss, on the grounds that there is a total lack of any evidence showing that the petitioning creditors' claims are fixed as to liability or liquidated as to amount; there is a total lack of any evidence showing that Mr. Hamilton is insolvent; there is a total lack of any evidence establishing the alleged acts of bankruptcy, and there has been no evidence offered, whatsoever, establishing claims fixed as to liability or liquidated as to amount of the alleged petitioning creditors, and no act of bankruptcy has been established which were not directly participated in by some of the petitioning creditors.

Mr. Willard: May we add to that, your Honor, that as to the petitioning creditor, Mr. Urie, there has been absolutely no evidence, period. He hasn't even shown his face in the court room.

Mr. Utley: Furthermore, there is no evidence to establish that Mr. Hamilton is a member of the alleged partnership of Brunson and Bunch.

* * *

Now, I think you are all familiar with my custom. I do not ordinarily have cases submitted on briefs. I prefer oral arguments in a case of this character where the matter [705] has been pending for some time.

It is absolutely important that the matter be disposed of as quickly as possible. I do not think there are any important questions of law that I am not familiar with in connection with this matter. If so, you can bring your cases and call my attention to them and I will read them as I go along, if they present any principle with which I am not familiar. So I want counsel to understand that I will be ready at the conclusion of the testimony to hear arguments to be presented by both sides on the merits of the case as to whether, regardless of whether we do it on the motions or whether we do it on the facts of the case, under the law and the facts as shown, as have been made, the respondent Wilbert Hamilton is a member of the partnership and an act of bankruptcy has been shown against him.

Kindly refresh my recollection as to what the status of the partnership is—I mean of the other two members of the partnership so far as the record is concerned.

* * *

Mr. Slate: Your Honor, such proofs of the actual bankruptcy as have been submitted during this trial have been wholly incidental, as we have been relying upon the point, as I understood it, that the sole issue before the court was that of partnership with Mr. Hamilton.

I call the court's attention to the record submitted into evidence through the auditor reflecting not only these payments, but several hundred payments within the past four months.

The Court: Well, if your auditor shows that, then, that is——

Mr. Slate: Yes, they are right there in the record.

The Court: Then you are going to rely on that. If not, you can open—of course, if Mr. Hamilton is not a partner, he is not in a position to do anything either to add or to detract from what Brunson and Bunch have done. If they wanted to default and have an adjudication against them—— [711]

Mr. Slate: That is what happened——

The Court: I cannot see how you can, by anything you do, set that aside.

Mr. Willard: We can't testify ourselves out of that position. We know that.

The Court: Yes.

Mr. Willard: If Mr. Hamilton is not a partner, we concede the matter is over with so far as he is concerned. It does not affect any act of Brunson and Bunch and, of course, insofar as any statement of the court relative to an issue of a partnership

being involved, there is no question but what it is a true statement, if that issue is determined adversely to petitioners, so far as Mr. Hamilton is concerned, we are out of the court room, because it has been established here by competent evidence that two of the petitioning creditors never saw Mr. Hamilton and did any business with him, and Mr. Urie hasn't come in to prove anything.

Mr. McClyman had \$1,000 with Mr. Hamilton, got it back from him and put it back; and that is the only transaction he ever had with him.

Mr. Slate: That statement is not quite true.

Mr. Willard: That is absolutely true, 100 per cent; 100 per cent; the testimony shows it.

The Court: Well, just a minute. As I say, I don't want [712] to prevent you from arguing any point you can, so far as Hamilton is concerned. You know, you are not required to rest merely upon the issue of partnership, if you want to deny the sufficiency of the proof so far as Mr. Hamilton is concerned. You may, without affecting the default of the other parties, make such argument upon the basis of the facts in the case. At the same time, counsel may rely on whatever the exhibits show as to the purview of insolvency of the partnership and any preferences to the parties, as to the parties, named or others.

Now Mr. McClyman has testified, so his evidence for whatever it is worth is in the record.

Mrs. Sauers has testified.

Now, what others have you? How about this

Strutzel and Coiffi? I don't know how to pronounce those names.

* * *

Mr. Slate: Do we have a ruling of the court as to whether or not that is an issue before the court?

The Court: Which?

Mr. Slate: In other words, the insolvency. Am I correct, [720] the only issue is the partnership in this proceeding?

The Court: Well, as far as Hamilton is concerned, he may take the alternative attitude and claim that—you see, I have to change my views as I get additional information. Here I find that he does not declare him as a creditor. He says he may be a creditor and just as McClyman may have been and he says he may be a partner, and so it is up to you whether you want to rely on the record. He is entitled to a finding on the issues tendered by the answer and in his answer, let us look at the answer again.

Mr. Utley: I think the issues are governed by the pleadings and he has answered.

The Court: That is right, the issues are governed by the pleadings. That is true. Let us look at the answer. Now, at the time that this petition was filed there had already been an adjudication, on November 13th. On November 13th there is an adjudication by Referee Dickson in which it recites:

“The first amended petition of George M. McClyman,” and so forth, the others——

“It appearing that said partnership has not filed in said proceeding any pleading or answer to said first amended petition, and

“It appearing that the time for pleading or answering said first amended petition expired on the 12th day of November, [721] 1947, and

“By reason of the foregoing, it appearing that said partnership has thereby defaulted in said proceedings;

“It is adjudged that the said Brunson and Bunch, a partnership, is a bankrupt, under the Act”——
So, all right.

Now, you have got that adjudication. I think that that was just on the schedules. That was not listed as a separate filing. I think they just used that as a means of filing schedules.

* * *

The Court: Well, they are not two partnerships. It is a partnership called Brunson and Bunch and the question is of whom does it consist? The court has found that the partnership is a bankrupt and has made an order.

Mr. Utley: But here is the situation. Mr. Hamilton says he is not a partner and he says he is not insolvent. Now, before that question could be determined—suppose for example that Mr. Hamilton should be found to be a partner, that would be possible and yet the court might not be able to hold that the partnership is bankrupt due to the fact that Mr. Hamilton might be worth a lot of money.

* * *

The Court: Just showing that a man is gullible does not make the other man a partner. He would not be the first one. You know the profit motive or, as an English economist popular about 25 years ago called it, the acquisitive motive, is very strong and it is very hard to explain what people will do, dominated by the acquisitive motive, and what they will do if they win or if they lose. All of a sudden people want to make money. When they lose money they want everybody in jail and everybody in the penitentiary, especially women. So we are not here to determine or designate the limits of [767] the motive, the "acquisitive motive." All of these people went in with the idea of making money. The question is, did they go in believing or not believing, with the understanding that Mr. Hamilton was a partner and they were to look to him for these guaranteed profits, or was he just an intermediary who, with their knowledge, was getting 10 per cent for acting as intermediary between them and these great investors who were turning everything into gold by preying upon the needs of the people.

Mr. Slate: Our position, your Honor, is that irrespective of the representations to the third parties Mr. Hamilton was actually a partner.

The Court: I understand your contention but I am saying that this inquiry, reliance upon a pertinent statement, doesn't make him necessarily a partner. A man may trust a lawyer and then be disappointed in the trust but that doesn't make the lawyer a partner. Many people have entrusted their funds to lawyers only to be disappointed be-

cause lawyers—some have been successful in being businessmen; some of us never touched the realm of business because we didn't feel that they combined—others, more modern, combined law with financial ability and became leaders and heads of big corporations.

You will notice that every big head of every big utility corporation is a lawyer who has reformed and become a [768] financier. The Edison Company, all the big title companies and everything else, they are all lawyers.

Now we are not here to determine as to what is right or what is wrong in that respect; we are here to determine whether these people dealt with Mr. Hamilton as a partner and whom they were to look to for their guarantee. All the evidence of this witness is to the effect that he was getting a profit, which was separate and apart, and it was delimited. There were three partners, the investor, the company and the agent, the broker, and the broker was Mr. Hamilton. He was getting 10 per cent, the others were getting 50 per cent and the investor was getting 40 per cent.

So you see, so far as this testimony is concerned, it does not add any strength to your case and the cross-examination does not lead anywhere because this man testified that he knew exactly how these were to be divided. Of course if I deal with a man knowing that he is making a profit which is distinct and apart from the third party who makes the investment, it can be argued I believe that he is a partner. But partners don't divide profit that way.

If this man—I am not saying the evidence, I am merely summing up the testimony of this witness—if Brunson and Bunch was a partner with Hamilton then of course the division would have been 60 to the partnership and 40 to him. The very fact that Mr. Hamilton's 10 per cent was denominated distinctly from that of the partnership [769] showed, so far as this man was concerned, that there was no representation of partnership.

* * *

So those are the tests by which we have to judge this evidence. The question before us is whether these sporadic contracts, or this series of contracts, showed the assumption of obligations as between Hamilton and the other members of the partnership which have all the indicia which the code and the rules of law provide for determining the establishment of partnership.

* * *

[Endorsed]: No. 12183. United States Court of Appeals for the Ninth Circuit. George M. McClyman, Elizabeth Spencer Sauers, Elizabeth Brau and Willis N. Urie, Appellants, vs. Wilbert C. Hamilton, Appellee. Transcript of Record. In Three Volumes. Vol. 1. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed February 14, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12183

In the Matter of:

WILBERT C. HAMILTON, Individually, and the
Partnership Known as BRUNSON & BUNCH,
Composed of WILLARD E. BRUNSON and
DEON BUNCH and the Said WILBERT C.
HAMILTON,

Alleged Bankrupts.

STATEMENT OF POINTS UPON WHICH AP-
PELLANTS INTEND TO RELY ON APPEAL

Come now the appellants, and herein specify the points upon which appellants intend to rely on appeal in the above-entitled matter, as follows, to wit:

(1) Error of the court in excluding evidence offered by petitioning creditors to establish fraud and deceit practiced by the respondent, Wilbert C. Hamilton, upon the petitioning creditors and other creditors of the partnership of Brunson & Bunch.

(2) Error of the court in excluding evidence offered by petitioning creditors to establish a general plan and scheme on the part of the respondent, Wilbert C. Hamilton, and Willard E. Brunson and Deon Bunch to cheat and defraud the petitioning creditors and other creditors of the partnership of Brunson & Bunch.

(3) Error and misconduct of the court in direct-

ing the court reporter not to report certain remarks of the Court made during the trial.

(4) Error and misconduct of the court in the court's ruling and statement that the court reporter belonged to the court and that the court reporter need not report all of the remarks of the Court or all of the proceedings before the court, but need only report what the court ordered the reporter to record and report during the trial of the proceedings.

(5) Error of the court in its finding of fact, finding and determining that the respondent, Wilbert C. Hamilton, is not indebted to the petitioner, George B. McClyman, in any amount whatsoever.

(6) Error of the court in its finding that the respondent, Wilbert C. Hamilton, is not indebted to the petitioner, Elizabeth Spencer Sauers, in any amount whatsoever.

(7) Error of the court in its finding that the respondent, Wilbert C. Hamilton, is not indebted to the petitioner, Elizabeth Brau, in any amount whatsoever.

(8) Error of the court in its finding that the respondent, Wilbert C. Hamilton, is not indebted to the petitioner, Willis N. Urie, in any amount whatsoever.

(9) Error of the court in its finding that the respondent, Wilbert C. Hamilton, is in no way responsible for the actions of the members of the co-partnership of Brunson & Bunch, to wit, Willard

E. Brunson and Deon Bunch, in regard to the commission by the said co-partners of any of the acts of bankruptcy alleged in the Amended Complaint (Petition).

(10) Error of the court in its finding that with reference to the dealings between the respondent, Wilbert C. Hamilton, and the partnership of Brunson & Bunch, each transaction was the subject of a special agreement and that no other representations were made by the respondent to any of the clients (investors).

(11) Error of the court in its finding that the petitioning creditors are not creditors of the respondent, Wilbert C. Hamilton.

(12) Error of the court in its finding that the accounts of the clients (investors) were kept in the books of the partnership, and the profits which the respondent received amounted to ten per cent, and were separate and distinct from the profits of the partnership; that such profits were "so entered upon whatever books he kept."

(13) Error of the court in its finding that no control was exercised by the respondent over the conduct of the affairs of the partnership.

(14) Error of the court in its finding that all that the respondent had was the promise of a certain percentage of the profits, the amount of which depended on whether the money invested belonged to a trust in which he had an interest, or belonged entirely to clients.

(15) Error of the court in its finding that the respondent Wilbert C. Hamilton was never associated with Willard E. Brunson and Deon Bunch in any co-partnership relationship of any kind or nature whatsoever.

(16) Error of the court in making findings of fact and drawing conclusions of law from such findings of fact, which findings of fact and conclusions of law are and each is outside of the issues, and not within the issues framed by the pleadings in the case, and each and all thereof being unsupported by the evidence admitted in the case.

(17) Error of the court in its finding that Wyman G. Reynolds, attorney at law, appeared in the trial on behalf of Willard E. Brunson and Deon Bunch, a co-partnership, doing business as Brunson & Bunch.

GLENN A. LANE and
H. H. SLATE,
Attorneys for Appellants.

/s/ By H. H. SLATE.

Received copy of the within Statement of Points Upon Which Appellants Intend to Rely on Appeal this day of February, 1949.

/s/ S. Y. ALLEN,
Attorney for Wilbert C.
Hamilton.

[Endorsed]: Filed Feb. 14, 1949.

[Title of Circuit Court of Appeals and Cause.]

APPELLANTS DESIGNATION OF PORTION
OF RECORD TO BE PRINTED FOR APPEAL

Come now the appellants, and herein designate the portions of the record in the above-entitled cause, to be printed as material, to the consideration of the appeal pending herein, as follows, to wit:

(1) Original Involuntary Petition in Bankruptcy, pages 2 through 7.

(2) Judge's Order of Reference, pages 8 through 9.

(3) Answer to Involuntary Petition in Bankruptcy, pages 10 through 18.

(4) Petition to File First Amended Involuntary Petition in Bankruptcy, page 20.

(5) Order of Referee to File First Amended Involuntary Petition in Bankruptcy, page 20.

(6) First Amended Involuntary Petition in Bankruptcy, pages 21 through 29.

(7) Answer to First Amended Involuntary Petition in Bankruptcy, pages 40 through 45 and pages 76 through 84.

(8) Request for Jury Trial, page 52.

(9) Interrogatories of Respondent Wilbert C. Hamilton to First Amended Petition in Bankruptcy, pages 46 through 50.

(10) Order Requiring Petitioning Creditors to Answer Interrogatories, page 51.

(11) Answers of Petitioning Creditors to Interrogatories, pages 56 through 75.

(12) Findings of Fact and Conclusions of Law, pages 124 through 130.

(13) Judgment of Court, pages 131 through 133.

(14) Motion for New Trial, pages 134 through 142.

(15) Affidavits of Glenn A. Lane, H. H. Slate, G. N. Williams, and G. B. McClyman, in Support of Motion for New Trial, pages 143 through 158.

(16) Order of Court Denying Motion for New Trial, page 168.

(17) Notice of Appeal, page 169.

(18) Cost Bond on Appeal, page 170.

(19) Affidavit for Order and Order Extending Time to Prepare Transcript and Docket Appeal, pages 208, through 211.

(20) Memorandum Decision by the Court, pages 115 through 118.

(21) Statement of Points on Which Appellants Intend to Rely on Appeal, pages 171 through 174.

(22) Reporter's Transcript of proceedings, as follows:

- a. Page 4, line 5, through page 5, line 25.
- b. Page 47, line 5, through page 49, line 9.
- c. Page 52, line 12, through page 56, line 8.
- d. Page 67, line 12, through page 83, line 16.
- e. Page 92, line 17, through page 99, line 15.
- f. Page 102, line 2, through page 106, line 3.

- g. Page 210, line 1, through page 223, line 9.
 - h. Page 242, line 7, through page 247, line 6.
 - i. Page 352, line 24, through page 353, line 3.
 - j. Page 434, line 15, through page 439, line 15.
 - k. Page 445, line 12, through page 445, line 25.
 - l. Page 458, line 22, through page 460, line 24.
 - m. Page 512, line 15, through page 513, line 19.
 - n. Page 525, line 24, through page 528, line 4.
 - o. Page 601, line 12, through page 601, line 20.
 - p. Page 621, line 9, through page 622, line 7.
 - q. Page 624, line 11, through page 624, line 18.
 - r. Page 702, line 2, through page 702, line 19.
 - s. Page 705, line 23, through page 706, line 18.
 - t. Page 711, line 8, through page 713, line 15.
 - u. Page 720, line 22, through page 722, line 10.
 - v. Page 724, line 13, through page 724, line 23.
 - w. Page 767, line 16, through page 770, line 2.
 - x. Page 865, line 19, through page 865, line 25,
- the word "partnership" only.

GLENN A. LANE and

H. H. SLATE,

Attorneys for Appellants.

/s/ By H. H. SLATE.

Received copy of the within Appellants Designation of Portion of Record to Be Printed for Appeal this 10th day of February, 1949.

/s/ S. Y. ALLEN,

Attorney for Wilbert C.

Hamilton.

[Endorsed]: Filed Feb. 14, 1949.

No. 12183.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE B. MCCLYMAN, ELIZABETH SPENCER SAUERS,
ELIZABETH BRAU and WILLIS N. URIE,

Appellants,

vs.

WILBERT C. HAMILTON,

Appellee.

APPELLANTS' OPENING BRIEF.

H. H. SLATE and

GLENN A. LANE,

1115 Stock Exchange Building, Los Angeles 14,

Attorneys for Petitioning Creditors.

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No. 12183.
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

GEORGE B. McCLYMAN, ELIZABETH SPENCER SAUERS,
ELIZABETH BRAU and WILLIS N. URIE,

Appellants,

vs.

WILBERT C. HAMILTON,

Appellee.

APPELLANTS' OPENING BRIEF.

**Statement of the Pleadings and Facts Disclosing
Jurisdiction.**

The appellants herein, petitioning creditors in the trial court, filed their First Amended Involuntary Petition in Bankruptcy on October 28, 1947, and respondent, defendant in the trial court, filed his answer thereto on November 26, 1947, and his Supplemental Answer thereto on December 19, 1947. Said petition alleged respondent to be a partner in the partnership known as Brunson and Bunch. Respondent filed his request for jury trial on November 26, 1947. Said respondent subsequently and prior to the commencement of said trial, withdrew his said request for a jury trial, and the action was tried by the court sitting without a jury. The District Court had jurisdiction of the matter by reason of the provisions of the U. S. Code, Title 11, Chapter 3, Section 21, and this court has jurisdiction to determine herein the within appeal by the provisions of U. S. Code, Title 11, Chapter 4, Section 47. [Tr. of Record p. 21 to and including p. 77.] Order of General Reference. [Tr. of Record pp. 8, 9 and 10.]

Statement of the Case.

The said First Amended Petition alleged respondent to be a partner in the partnership known as Brunson & Bunch, and the Answer thereto denied that respondent was a partner therein, and that he was insolvent. A number of persons, in excess of sixty-five, had invested monies in said partnership through the solicitation, personal and by agent, of respondent. At the trial of the action, appellants offered to prove by evidence tending to show fraudulent misrepresentations made to them by respondent, and evidence tending to show a general plan and scheme to defraud said persons of said investments originating with and perpetrated by respondent, and the admitted members of the said partnership. The trial court wholly excluded this evidence on the ground that it did not tend to show that respondent was a partner in said partnership, and had no bearing on the issues before the court; that the trial court further stated that the only issues before the court were whether or not the respondent was a partner, and if so, whether he was insolvent. At the conclusion of the trial, the court made its findings of fact and conclusions of law, and filed its Memorandum Decision and Judgment.

Appellants contend that the court erred as follows:

1. In excluding said evidence tending to show fraudulent misrepresentations and a general fraudulent plan and scheme offered to establish the fact that respondent was a partner, was prejudicial error.
2. In finding that the respondent, Wilbert C. Hamilton, is not indebted to petitioning creditors, or any of them, in any amount whatsoever.

3. In directing the court reporter not to report certain remarks of the court made during the trial.

4. By reason of error and misconduct of the court which prevented appellants from having a fair trial of the issues framed by the pleadings.

I.

The Court Erred in Excluding Said Evidence Tending to Show Fraudulent Misrepresentations and a General Fraudulent Plan and Scheme, Offered to Establish the Fact That Respondent Was a Partner, Which Amounted to Prejudicial Error.

No written agreement of partnership is known to exist between the respondent and the admitted partners of the said partnership. Appellants were therefore placed in the position of proving respondent a partner by showing an ostensible partnership, by statements, acts, or conduct of the respondent, amounting to an estoppel. The court wholly excluded this evidence by its specific rulings thereon, as shown:

“The Court: What is the materiality of that? We are not trying a criminal law suit here. We are trying a simple law suit. This isn't the first one of this kind that I have tried. I have tried a lot of them. I know the temptation there is, especially when your clients are sitting in the court room, who were investors, to air everything in court, *but this is no place to determine anything except the simple proposition: Is Mr. Hamilton a member of this partnership, and is it insolvent? Otherwise I am not interested.*

Mr. Slate: This is offered to show the complete cooperation that existed between Mr. Brunson and

Mr. Hamilton in all matters, even extending to that matter.

The Court: That does not make any difference, the fact that he appeared in the District Attorney's office. That does not prove partnership." [Tr. of Record p. 133.]

* * * * *

"The Court: You may know the fact. I don't know. It may or may not. If Mr. Hamilton sat in other than as an attorney, as a principal, and discussed with persons, say, representatives of the Board of Trade, presenting an assignment to creditors, that may have a bearing on whether by any actions he acknowledged he was a partner or had an interest in it. The rights of the parties, the contractual rights of the parties are determined by the law of the state in which we sit, and whether or not a man is a partner has to be determined under the law of California. And under the law of California it isn't necessary that you write an agreement of partnership. If, as a matter of fact, he participates in the profits of the corporation, even though there may be two or more in the venture and even though there be no written agreement, the court may find a partnership actually existed, even though the man denies that it exists. That is the law which governs here, the law of California. So that the proof as to the existence of a partnership must be of a very broad nature. . . .

Mr. Utley: I understand that.

The Court: —because of the nature of the matter. Therefore, admissions, participation, suggestions for control, and the hearing of complaints are just as revealing to a person who, like myself, is charged with the duty of finding or not finding a partnership as the actual splitting of profits. And if this were before a jury, I would have to instruct the jury

that in determining whether a partnership exists they have a right to find and to consider what, if any, profits were divided, and also, whether the man participated in the management, whether he had something to say about policy, whether he had control over the other men whose names actually appeared and who—I don't mean to use the word disparagingly—who fronted for the men behind the facade. I am using it in the ordinary sense, and not in a disparaging sense. For that reason the scope of the inquiry must be broad. Therefore, while I am going to limit the inquiry to the particular issues, in proof of the particular issues I am going to allow all matters which are relevant to prove participation, which may make him a partner, whether he actually signed his name to it or not, because we are not dealing here with a law suit between two partners. We are dealing here with the rights of third parties, that is, creditors, and the law is entirely different. What may not be sufficient to establish a partnership as between two partners, who sue each other to try to prove the existence or non-existence of a partnership. . . .

Mr. Utley: I think I understand.

The Court: . . . may be sufficient when we are talking about the rights of third parties as against those two. An entirely different type of proof is required. If you want to determine what is required under the law of California, all you have to do is to go to the Blue Book to see what is and what is not necessary to prove partnership. For that reason many of these incidents which would have no bearing if Mr. Bunch and Mr. Brunson were suing Mr. Hamilton in a civil suit of a type which can be brought between partners, such as a dissolution of partnership, or the like, or for an accounting of profits, then that

type of evidence would be insufficient to establish such a relationship, but it might be ample in a suit like this, which is a suit by creditors to hold a man to responsibility as a member of a partnership." [Tr. of Record pp. 135-137.]

* * * * *

"The Court: *What bearing does the fact that the man invested money have upon the partnership? You may sit down now.*

Mr. Slate: *To prove how the funds were taken from the investors and given to Mr. Hamilton. We have a list of items here, of approximately 60 individual and separate items, most of them involving these people who put their money in, and show the partnership between Mr. Hamilton and Mr. Brunson. As Your Honor knows, we have had a terrible time to get this list.*

The Court: *The question of how that was put up is not material. It is what he did with it as to the partnership.*" [Tr. of Record p. 140.]

* * * * *

"Mr. Lane: But that is why we brought them in, to prove that Mr. Hamilton went out himself and made these representations, participated in it, and told these different people different things.

The Court: Those representations do not bear on partnership, and we are not trying a mail fraud suit, or obtaining money under false pretenses. A man may do so merely as a salesman, or for other reasons, and the fact that he represents that profits were made does not prove partnership. But I will allow you to put on the best witness you have." [Tr. of Record p. 144.]

* * * * *

“The Court: Gentlemen, let us get away from this idea that I am trying a question of fraud here. I am not trying a question of fraud or anything else. I am trying to establish if there is a partnership and who composed it and if it is insolvent.” [Tr. of Record p. 180.]

* * * * *

“Mr. Slate: Your Honor, we want to get it through as soon as possible, and we would like to finish it tomorrow.

The Court: I cannot see why it can't be finished tomorrow.

Mr. Slate: Here is the reason: our further evidence has to do to a great extent with an audit that has been made over a period of eight months by a certified public accountant, and it took me about three weeks to understand the transactions.

The Court: Well, you don't have to explain that all now. Counsel, here is the point. The rule of the federal court is this—pardon me if I seem didactic; although it is over ten years since I taught in law school, I still retain the habit—but I am merely indicating what the law is so that you may be guided by it. In the law in the federal court we have a very salutary rule, and that is that summaries of public accountants are received in evidence upon their being identified, providing the books, the originals are available so that your adversary can consider them. I cannot see why counsel under the circumstances cannot stipulate to the summary. They can stipulate what checks show, what money went in, what sums of money and where they went, and then the question of the inference to be drawn would become a question of law, because I don't want the accountant to be a lawyer, I like them to keep their province. As a matter of fact, we have great difficulties with them, it

is a difficult job to keep them within limits, because they will talk at the drop of a hat about discovering a 10-cent error. Their work is trying to discover somebody else's error. So I don't see that it is necessary or that it would even be permissible for you to go through that and take a week to explain to me what is in it.

Mr. Slate: Your Honor, the report after it finally came from the auditor and which we have gone through finally with the auditor's help, we have found a series of transactions, one right after another, during this pertinent period, all tending to show partnership and that Mr. Hamilton was actually the dominant figure in the business known as Brunson and Bunch.

The Court: All right; but supposing they stipulate, without admitting the conclusions, stipulate that this is a correct summary of these transactions as of their appearance in the book—that is all I will allow you to do—not that I will allow you to do, but that is all that is necessary as a factual basis. Then the question of analysis is one which is a matter of argument for you to address to me either orally or in writing, and is one to be determined after the evidence is in. What I want to do is to get all the evidence in so that there will not be a hiatus, and then you gentlemen can brief it and I will read your briefs, wherever I am, and determine the matter and if I believe that I need additional oral arguments, I will set a time for the argument when I get back in September. I can set some Monday for additional oral argument.

Mr. Slate: Your Honor, most of this money, or not most of it but a large block of this money, did not go through the books, was handled in cash transactions, cashier's checks and actual cash given, and

cannot possibly be explained through the auditor's summary. I feel we will want to show that these transactions were not legitimate.

The Court: If they were not legitimate, that is an inference to be drawn. Let us talk informally. Let's talk off the record and see what we are going to do." [Tr. of Record pp. 183-185.]

* * * * *

"The Court: I am not going to make any order at the present time. I think this is developing into such a wide expedition here that we are duplicating everything that was done. You will have to show me as to each specific thing that you don't have a copy of or that this wasn't available to you, because *I am not going to take an accounting here*, as I told you before. If you want an accounting, I will send you to a master. But, I have to determine, first, whether there was an act of bankruptcy committed and whether Mr. Hamilton was a member of a partnership, before you get down to an accounting, and the object of this trial is to take evidence from which the court can determine whether a partnership existed.

Mr. Slate: What we are attempting to prove—

The Court: I know what you are attempting to prove. You cannot prove it on cross-examination by this manner. You have this witness under oath. He admits the check and I am not going to tell him to bring in the cancelled checks. You are going to be ordered to ask him only on such documents as you have now." [Tr. of Record p. 189.]

* * * * *

"Mr. Slate: What we really want to show there is that Mr. Hamilton out of his personal account paid a partnership debt.

The Court: All right. You have his admission, what he did, and the check won't show any more than what it contains, and that is all there is to it.

Mr. Slate: Then, the court will not have him bring in that check?

The Court: You can argue that. I am not going to make any order in regard to that check." [Tr. of Record pp. 191-2.]

Seymour v. Oelrichs, 115 Cal. 782 at 795-7, 106 Pac. 88;

Bedell v. Morris, 63 Cal. App. 453 at 456, 218 Pac. 769.

II.

The Court Erred in Finding That the Respondent, Wilbert C. Hamilton, Is Not Indebted to the Petitioning Creditors, or Any of Them, in Any Amount Whatsoever.

In each of the findings designated (e) (f) (g) and (h), the court found "that the respondent, Wilbert C. Hamilton, is not indebted to the petitioner (naming petitioner) in any amount whatsoever." [Tr. of Record pp. 79-80.]

Items 5, 6, 7 and 8 of Statement of Points Upon Which Appellants Intend to Rely on Appeal specify the error in said findings. [Tr. of Record p. 202.]

In his opening remarks, the court stated "all we are interested in is to find out or determine whether there is an insolvency in the case, and whether Mr. Hamilton is a member of the partnership that is insolvent." [Tr. of Record p. 132.]

Throughout the entire trial, the court repeatedly reiterated this position, and continually ruled against the

admission of evidence not specifically directed to the said two points, insolvency and partnership.

On numerous occasions when appellants attempted to present evidence bearing upon the matters covered by said findings, the respondent objected thereto and in each instance the court sustained objections and refused to admit such evidence.

Again at page 133 of the Transcript of Record, we find the following statement by the Court:

“ . . . but this is no place to determine anything except the simple proposition: Is Mr. Hamilton a member of this partnership, and is it insolvent? Otherwise I am not interested.”

We quote other statements by the Court as follows:

“By the Court: . . . I do not intend to keep this proceeding before me except for the purpose of this trial and to determine this issue.” [Tr. of Record p. 134.]

“By the Court: . . . so after I decide this one matter, then it will go back and all further proceedings will be had before the Referee. . . .” [Tr. of Record p. 134.]

“By the Court: . . . After all, I have developed some technique in my time as a judge. This is my twenty-first year as a judge, so you gentlemen ought to know by now that I do not allow any wild goose chase.” [Tr. of Record pp. 137 and 138.]

The following is found on page 140 of the Transcript of Record:

“The Court: What bearing does the fact that the man invested money have upon the partnership? You may sit down now.

Mr. Slate: To prove how the funds were taken from the investors and given to Mr. Hamilton. We have a list of items here, of approximately 60 individual and separate items, most of them involving these people who put their money in, and to show the partnership between Mr. Hamilton and Br. Brunson. As your Honor knows, we have had a terrible time to get this list.

The Court: The question of how that was put up is not material. It is what he did with it as to the partnership."

On page 143 of the Transcript of Record, the Court is quoted:

" . . . But once more I say that I am not interested now in the accuracy of the books. I am interested in just one thing, was he a partner, and the amount of money he turned over, and does it bear on the partnership? When I have decided that question, and when I find there is bankruptcy and that he is a partner to it, that he is insolvent in his individual capacity, then I will send you back to the referee, and if that referee will not hear it, I will change the referee, I will appoint one who will hear it, and then all these people who did not get their money will have their chance in court to prove their claims. I am not establishing claims here. That is not the function of a judge.

Mr. Lane: But that is why we brought them in, to prove that Mr. Hamilton went out himself and made these representations, participated in it, and told these different people different things.

The Court: Those representations do not bear on partnership, and we are not trying a mail fraud suit, or obtaining money under false pretenses. A man may do so merely as a salesman, or for other rea-

sons, and the fact that he represents that profits were made does not prove partnership. But I will allow you to put on the best witness you have."

The following conversation is reflected on page 147 of the Transcript of Record:

"Mr. Lane: . . . We also had the further purpose that if the issue was properly to be presented on the question of fraud, that she would be here on that. Now the court has ruled on that, and that point is eliminated. But in regard to the establishment of solvency or insolvency we believe that she is—pardon me. Let me put it this way: We believe she may be a very material witness.

The Court: All right. Put her on. . . ."

Page 153 of the Transcript of Record:

"The Court: I will deny the motion. Do you want to ask any questions?

Mr. Utley: Certainly, there is nothing there that tends to prove or disprove a partnership.

The Court: I have something in mind. I can't tell you yet. You will have to use your own judgment."

Page 173 of the Transcript of Record:

"The Court: I can't agree with your conception of the case, as to what you have to prove in this case. All you have got to prove is insolvency, and in this case that he is a partner."

Page 180 of the Transcript of Record:

"The Court: Gentlemen, let us get away from this idea that I am trying a question of fraud here. I am not trying a question of fraud or anything else. I

am trying to establish if there is a partnership and who composed it, and if it is insolvent.”

Page 189 of the Transcript of Record:

“The Court: . . . I am not going to take an accounting here, as I told you before. If you want an accounting, I will send you to a master. But, I have to determine, first, whether there was an act of bankruptcy committed and whether Mr. Hamilton was a member of a partnership, before you get down to an accounting, and the object of this trial is to take evidence from which the court can determine whether a partnership existed.”

Pages 190-1 of the Transcript of Record:

“Mr. Utley: Just a moment, your Honor. Your Honor, how could this possibly be material to any of the issues in this case? And I object to it on that ground. Whether he received it or didn't receive it would not show whether or not he was a partner, it wouldn't show whether or not he was insolvent. It has nothing to do whatsoever with the issues in this case.”

Page 194 of the Transcript of Record:

“Mr. Slate: Your Honor, such proofs of the actual bankruptcy as have been submitted during this trial have been wholly incidental, as we have been relying upon the point, as I understood it, that the sole issue before the court was that of partnership with Mr. Hamilton.”

Page 199 of the Transcript of Record:

“The Court: Now we are not here to determine as to what is right or what is wrong in that respect; we are here to determine whether these people dealt with Mr. Hamilton as a partner and whom they were to look to for their guarantee. . . .”

III.

Error and Misconduct of the Court in Directing the Court Reporter Not to Report Certain Remarks of the Court Made During the Trial.

The inconsistency and unfairness of the Court, as demonstrated by the foregoing third point in this brief, is further and more forcibly demonstrated by the Court's conduct and statements at the conclusion of the morning session on the second day of the trial, to-wit, June 30, 1948, at about the hour of 12:40 o'clock P. M., as shown by the affidavits of Glenn A. Lane, G. N. Williams, H. H. Slate, and George B. McClyman, made and filed in support of Appellants' Motions for New Trial and to Set Aside and Vacate Judgment. [Tr. of Record p. 97.]

We quote from the Transcript of Record, commencing on page 98 and continuing to page 103:

"That at about the hour aforesaid, and while the Honorable Leon R. Yankwich was presiding in the trial of the issues of said case, the said Honorable Leon R. Yankwich stated that the court was then adjourning for the usual noon recess; that counsel should prepare themselves for night sessions to try said case, because the Court was scheduled to leave for San Francisco, California, to try other matters, at the conclusion of the next day, to wit, July 1, 1948, and that the Court was going to finish the trial of the issues then pending before the Court in the above-entitled matter, within the period of three days, to wit, June 29, June 30 and July 1, 1948, which he had allotted to said case, and that if it was necessary to stay over for night sessions, the Court was giving counsel fair warning at that time that the Court would still see that the case was finished within that time;

“That the Court further stated that if said case was not completed at the conclusion of the next day, that the Court would declare a mistrial, and would send the case back for trial before some other Judge;

“That the Court thereupon reiterated its remarks that the case would have to be completed within the period of three days’ total time allotted by him to the case, and that if it was not completed by the end of the next day, he would declare a mistrial; that he, the Court, had set aside three days for the case, and that was all the time that was going to be allotted to the case; that there was no reason why said matter could not be completed within the said three days, and that counsel could prepare themselves for night sessions;

“That the Court further stated that the only issue before the Court was the simple question of determining whether or not the respondent, Wilbert C. Hamilton, was a partner in the firm of Brunson & Bunch, and that the case was going to be completed within the said three days, or the Court would declare a mistrial;

“That Affiant thereupon stated to the Court that ‘Your Honor, if that is the decision of the Court, you might just as well declare a mistrial at this time, because this case cannot be completed by tomorrow night, and in our opinion, the trial of this case will require at least four weeks.’

“That thereupon the said Court stated that this case was going to be completed within the three days’ time allotted to it, and that ‘there is no reason why the simple question of whether or not Hamilton is a partner should consume any more time than three days,’ and that the Court was not going to declare any mistrial; and that counsel could come back at

2:00 p. m. and the case would proceed to trial and would be completed within the time allotted to it, and there was no reason why the case should consume four weeks, and the Court could not see how it could possibly consume four weeks;

“That the Court thereupon stated, ‘You told me that this case would take only three days to try. When this case was set for hearing at the previous date, I said that I could continue it to this date, and that it would have only three days, and you told me that you could try this case within three days.’ Affiant then stated to the Court, ‘If the Court please, the Court’s statement is in error, because I was not even present in Los Angeles County at the time that this matter was continued, and I have never at any time made any statement to the Court to that effect, and I was not present at any time when I could have made any such statement, and in fact, at the time that the Court claims I made such a statement, I was in San Francisco.’

“That the Court thereupon stated, ‘Well, somebody said it would take only three days.’ Affiant thereupon stated, ‘I was not present at the time that the matter was continued, but it is my understanding that opposing counsel made the statement at that time as they have made on other occasions when I was present, that the case should be tried and completed in three days.’ The Court thereupon stated in effect that Affiant had deliberately misled the Court and that Affiant as ‘now attempting to mislead the Court’ by his actions, and that the Court had no intention of granting a mistrial, now that the case had proceeded thus far, and that Affiant’s ‘attempt to get the Court to grant a mistrial’ was very unfair to the Court, and that the Court was ‘being imposed upon’ by Affiant, and that if Affiant would ‘get down and try the case

and quit trying to get into issues that have nothing to do with the case,' that the case could be completed in three days and within the time allotted, and that the Court was refusing to declare a mistrial, and would not let the petitioning creditors and their attorneys 'get out of trying this case, now that we have gone this far.'

"That Affiant thereupon noted that the court reporter was sitting at his desk and not taking down any of the remarks of the Court, or any of the proceedings that were then transpiring; that Affiant thereupon stated to the Court substantially as follows: 'I notice that the reporter is not reporting these proceedings and is not taking down the statements of the Court, and I believe that these proceedings are very important, and that the remarks of the Court are very pertinent, and that the reporter should be reporting all of these proceedings, and I ask the Court to please instruct the reporter to take down all of the proceedings that are now transpiring, and to report the remarks of the court and any remarks that I make, or any other counsel in this proceeding.' The Court thereupon stated, 'He doesn't have to report these proceedings, and I am instructing him not to report what I am saying to you and what you are saying at this time. He is my reporter, and I will tell him "what I want him to report, and you won't tell him what is to be reported, and you won't tell me what is to be reported. I am running this court room, and I will have my reporter report what I want him to report, and when I want to make remarks directed to you like I am doing, I don't want my reporter to take those down, and I am telling him right now not to take them down. I have a right to tell you what I think about the way you are trying the case, and I have a right to talk to you about this case

without having the reporter write down what I am saying. I will run this case in my own way, and I will run this court room in my own way, and you are not coming up here and telling me how to run my court and how to try cases. I have been trying cases for 21 years, and I know how to run my court, and you are not coming up here and telling me when and what my reporter will report on these proceedings and how I will try the case. My reporter will not report these remarks, and that is the way I am going to run my court.”’

“Affiant thereupon stated, ‘I believe that your Honor’s ruling is erroneous and that we are entitled to have all of the remarks of the court which are made in the conduct of the trial of the case, and particularly any remarks made in the open courtroom, reported by the reporter, and I assign the remarks just made by the Court as error, and I object to the Court’s remarks and object to the Court’s ruling, and again ask the Court to instruct the reporter to record all of the remarks made by the Court or by me or by any other counsel in these proceedings, and I ask the Court to immediately instruct the reporter to take down what I am saying right now, and to report every remark hereafter made by the Court.’

“That the Court thereupon stated that the reporter would not report ‘any part of it.’ that the Court was not in session, that he had taken a recess and that he would ‘run my trial the way I want to,’ and that the ‘attempt’ on the part of Affiant to get a mistrial was unfair to the Court; that counsel ‘had misled the Court from the start,’ and that the Court wasn’t trying ‘to force anybody to do what is impossible,’ but that the Court saw no reason why the case could not be completed within three days’ total time, and that

counsel could come back at 2:00 o'clock and put on his witness and proceed with the trial of the case, and that the case was definitely going to be completed by the end of the next day.

“That the Court then stated, ‘You will come back into this courtroom at 2:00 P. M., and you will put on Mrs. Hamilton, the wife of Mr. Hamilton, as your next witness.’ ”

It is notable that the affidavits were never controverted by the Court, or any of the attorneys, or by the respondent, Wilbert C. Hamilton. In this respect, it is important to note that the affidavits were filed with the Court in support of the Motions for New Trial and to Set Aside and Vacate Judgment, and that the Court acknowledged that he had read the same, and commented thereon at the time of the hearing on said motions. At no time did the Court, or anyone else, ever deny the accuracy of any of the statements contained therein.

The attitude and conduct of the Court made it impossible for the appellants to have a fair and impartial trial upon the issues of the case. From the inception of the case, commencing with the Court's opening statement, continually throughout the trial and in his closing remarks, the Court ruled that no evidence would be admitted except upon the issues whether Hamilton was a partner, and whether the partnership was insolvent. Notwithstanding the exclusion of evidence directed to prove the general plan and scheme on the part of Hamilton and the admitted members of the partnership to perpetrate fraud and deceit, and the exclusion of evidence offered to prove that the funds of the investors found their way through devious and intricate transfers from respondent Hamilton's trustee bank accounts, his wife's personal and trust

accounts, into Hamilton's personal account, the Court made specific findings that Hamilton did not borrow money from the appellants, and was not indebted to any of the appellants "in any amount whatsoever," and that the "dealings between the respondent, Wilbert C. Hamilton, and the partnership . . . were governed by agreements . . . whereby, in consideration of the respondent's furnishing money belonging to his clients or to trusts over which he had control, a definite percentage of the profits were promised" and "no other representations were made by the respondent, Wilbert C. Hamilton, to any of the clients."

People v. Reese, 136 Cal. App. 657, 29 P. 2d 450;

Podlasky v. Price, 87 Cal. App. 2d 151, 196 P. 2d 608;

Etzel v. Rosenbloom, 83 Cal. App. 2d 758, 198 P. 2d 848;

Murr v. Murr, 87 Cal. App. 2d 511, 197 P. 2d 369.

We quote from the *Podlasky* case, commencing at page 164:

"If no other grounds for reversal existed, the conduct of the trial judge alone would adequately supply them. Judge Burnell at various stages of the trial made statements calculated to intimidate the litigants and their counsel and to confuse the witnesses."

We quote from the *Reese* case, commencing at page 666:

"By the Court: If he is (has returned to the state), anyone that wishes can put him on the stand, but the idea is to get the facts before this jury, and not to play a game to see how many points either side can win.

“When complaining witness had testified that he had paid the sum of \$20,000 to one of the defendants in connection with the sale of shares of stock, the attorney for the People asked him:

“‘Q. Did you get anything for that \$20,000? A. Not a thing.’ The judge then interposed the following question: ‘You got experience, didn’t you? A. Plenty of that.’”

We quote from the *Murr* case, commencing at page 520:

“It is therefore clear that such conduct on the part of the trial judge deprived the plaintiff of a fair trial. In such a case, which included close questions pertaining to the laws of nature and to medical science, the judge’s comment that the case should be tried in 10 or 20 minutes and his many other ill-advised and unnecessary comments with respect to wasting his time establish definitely that he did not consider that the issues presented by plaintiff were worthy of consideration.”

“... so you, gentlemen, ought to know by now that I do not allow any wild goose-chase.” [Tr. of Record p. 138.]

“Mr. Lane: Thank you, your Honor. Now, I would like to state this, that so far as any witness that can be called on the telephone, it is perfectly agreeable that he leave, with the understanding he is subject to call.

The Court: I am not making any orders about call on the telephone except as to Mrs. Hamilton. I am just making the order with reference to her.

Mr. Lane: But I wanted it clear that we are perfectly willing to follow through in that way.

The Court: That isn't the point. I am not interested in what you are wanting to do on that. I have already indicated that you appear not to be willing to do anything except to follow your own ideas, and so I am exercising my own prerogative in running this court." [Tr. of Record p. 151.]

"The Court: I will deny the motion. Do you want to ask any question?

Mr. Utley: Certainly, there is nothing there that tends to prove or disprove a partnership.

The Court: I have something in mind. I can't tell you yet. You will have to use your own judgment." [Tr. of Record pp. 153-4.]

"The Court: Judges never get into this type of thing because they haven't enough money to spare. They have to raise a family on a salary; unless they have been on the bench and retire and capitalize on any reputation they make. But real judges, who stay on the bench, and not men who have been there and gone into private practice do not get involved in this type of thing." [Tr. of Record p. 156.]

"The Court: I tell you, you come back tomorrow at 2:00 o'clock. If they haven't reached you by that time, I will make them put you on anyway." [Tr. of Record p. 162.]

The conduct of the trial court in the case at bar, as shown by the portions of the transcript quoted above, indicates error far exceeding the conduct of the trial judge in the *Podlasky*, *Reese* and *Murr* cases.

IV.

By Reason of Error and Misconduct of the Court
Appellants Were Prevented From Having a Fair
Trial of the Issues Framed by the Pleadings.

First, the trial court did not permit appellants to introduce any testimony or evidence tending to show fraudulent representations made to appellants and other creditors of the partnership or tending to show a general plan and scheme, between respondent and the two admitted partners of the bankrupt partnership, to defraud appellants and other creditors. As pointed out in appellants' Point I herein, the existence of a partnership in which respondent was a partner could be shown only by establishing the fact that respondent was an ostensible partner. For instance, that he held himself out by his representations to appellants and other creditors of the bankrupt partnership, to be the source of the money used in the operation of the partnership business; also, by showing the existence of a partnership in which respondent was a partner by testimony and evidence of a general plan and scheme between respondent and the admitted members of the bankrupt partnership, to defraud appellants and other persons investing their money in the partnership business. On the contrary, the trial court restricted appellants in the introduction of the testimony and evidence to testimony and evidence of direct statements by respondent of his interest, if any, in the said partnership, and of his acts and conduct only to the extent that such acts or conduct might show a sharing of profits or an exercise of managerial authority over the affairs of the partnership. As thus restricted, appellants were prejudiced in presenting their case, since the facts in their possession showed a concerted and well thought out plan and scheme to corral large amounts of

money from appellants and other investors and the use of that money, by respondent, and the other members of the partnership, for purposes wholly foreign to and entirely disconnected from the purposes for which the monies were invested in the partnership and the representations of respondent by which such investments were obtained. It is obvious, therefore, that the restriction as to testimony and evidence made by the trial court wholly prohibited appellants from showing the true situation, as it in fact existed, and which appellants offered to prove by means of the auditor's report and the tracing of funds through respondent to the partnership and back to the respondent, under circumstances that were clearly prohibited by the terms and conditions under which those monies were invested.

Second, the action of the trial court in arbitrarily limiting the reporter in recording the actual happenings in open court show an attitude on the part of the Court to run the Court for the judge's own purposes and not for the benefit of litigants. As set forth in appellants' Point II herein, there arose and were decided and ruled upon by the Court important questions of procedure and the order of presentation of appellants' case. It should be remembered that at the commencement of the trial the trial judge refused to hear any opening statement by appellants or respondent, and the judge therefore could have had no clear conception of the order of proof of appellants' case. [Tr. of Record p. 133.] Appellants on several occasions attempted to point this matter out to the trial judge, but were repeatedly overruled, and it was only after appellants' counsel's insistence to an extreme degree that the trial judge acceded in part to appellants' theory of presenting the case. Furthermore, the citations from the Transcript of Record under appellants' Point III herein show an attitude on the

part of the trial judge to try the case himself, and clearly indicate that the matter was largely prejudged by the trial court.

Third, after limiting appellants to the type and *quantum* of evidence on the issue of partnership, the trial court then proceeded to make findings of fact, as pointed out in appellants' Point II herein, to the effect that "respondent is not indebted to petitioning creditors" (appellants herein), and that the respondent made no representations to them. This was clearly error, for the reason that appellants were not permitted to show whether or not respondent did in fact make representations to them, and what those representations were. The trial court arbitrarily assumed that since they tended to show fraud, they were not admissible at the trial upon any other theory.

All of the foregoing, taken and considered in its entirety, clearly shows that appellants were effectively prevented from having a fair and impartial trial of the issues framed by the pleadings.

Wherefore, appellants respectfully pray that the judgment be reversed and that a new trial be ordered, and for such other and further relief as the justice of the case might require.

Respectfully submitted,

H. H. SLATE and

GLENN A. LANE,

Attorneys for Petitioning Creditors.

No. 12183

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE B. MCCLYMAN, ELIZABETH SPENCER SAUERS,
ELIZABETH BRAU and WILLIS N. URIE,

Appellants,

vs.

WILBERT C. HAMILTON,

Appellee.

APPELLEE'S REPLY BRIEF.

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Appellants,

vs.

WILBERT C. HAMILTON,

Appellee.

APPELLEE'S REPLY BRIEF.

This is an appeal by the petitioning creditors in the above entitled bankruptcy proceeding "from the final judgment entered in this action on September 30, 1948, and from the order and judgment denying motion of petitioning creditors for a new trial, entered on October 25, 1948. [Tr. of Record pp. 115-116.]

Statement of Case.

This bankruptcy proceeding was begun by the filing of an involuntary petition in bankruptcy by appellants herein on September 26, 1947. [Tr. of Record pp. 2-8.] Appellee Wilbert C. Hamilton filed his answer thereto on October 2, 1947, denying, among other things, that he was a partner with Willard E. Brunson and Deon Bunch, or either of them, or that he was ever engaged as a copartner with either of said persons under the firm name of Brunson & Bunch or otherwise; denying that he was insolvent; denying that he was indebted to any of the petitioning creditors; and further, that any of said petitioning creditors had claims fixed as to liability and liquidated as to amount against him. [Tr. of Record pp. 10-19, incl.]

Thereafter, an amended involuntary petition was filed by appellants [Tr. of Record pp. 21-31, incl.] and appellee answered said amended involuntary petition in bankruptcy raising the same issues as hereinbefore mentioned. [Tr. of Record pp. 32-38, incl., and pp. 38-48, incl.]

The case was tried before the Court on June 29th and 30th, July 1st, September 7th, 8th and 9th, 1948. [See Findings, Tr. of Record p. 77.]

The Court filed its Memorandum Decision on September 14, 1948 [Tr. of Record pp. 121-124], and thereafter and on September 30, 1948, Findings of Fact and Conclusions of Law and Judgment were signed and filed in favor of appellee. [Tr. of Record pp. 77-86, incl.]

Record on Appeal.

In taking this appeal, appellants have not seen fit to favor this Honorable Court with a transcript of the testimony taken at the trial, which consumed a period of six days, but apparently are content to only furnish this Honorable Court with a portion of the pleadings filed in said case, together with some of the comments made by the Court during the course of the trial and a portion of the testimony of Dr. Raymond E. Donahey [Tr. of Record pp. 153-157], one of the several witnesses who appeared and testified at the trial.

Points Raised by Appellants on Appeal.

Appellants contend that the Court erred:

1. In excluding certain evidence which tended to show fraudulent misrepresentations and a general fraudulent plan and scheme offered to establish the fact that appellee was a partner of Brunson & Bunch.
2. In finding that appellee Wilbert C. Hamilton is not indebted to petitioning creditors or any of them, in any amount whatsoever.
3. In directing the court reporter not to report certain remarks of the Court made during the trial.
4. Misconduct of the Court which prevented appellants from having a fair trial.

POINT I RAISED BY APPELLANTS.

The Court Did Not Exclude Any Evidence Which Tended in Any Way to Establish the Fact That Appellee, Wilbert C. Hamilton, Was a Partner of Brunson & Bunch.

If, in fact, the Court excluded any evidence which properly tended to show that appellee, Wilbert C. Hamilton, was a partner of the partnership of Brunson & Bunch, whether it was evidence tending to show fraudulent misrepresentations and a general fraudulent plan and scheme, or otherwise, the same does not appear in the transcript of the record offered to this Honorable Court by appellants, and further, counsel for appellants have not pointed out such a ruling by the Court in their brief. All that is pointed out, either in appellants' brief or the transcript of record, is a portion of a colloquy between counsel and the Court.

The Court said at one point, "I am not going to make any order at the present time." (See quotation from App. Op. Br. p. 9.)

The Court again said :

"Those representations do not bear on partnership, and we are not trying a mail fraud suit, or obtaining money under false pretenses. A man may do so merely as a salesman, or for other reasons, and the fact that he represents that profits were made does not prove partnership. But I will allow you to put on the best witness you have." (See quotation from App. Op. Br. on bottom of p. 12, continuing on p. 13.)

The above quotations, it seems to us, is the nearest the Court came to ruling upon the question of evidence in so far as the record before this Honorable Court is concerned and this, standing by itself, in the absence of the

entire record, fails to disclose a definite and final ruling excluding or refusing to receive any evidence.

On the contrary, in the last quotation above, the Court stated why it thought the evidence which the appellants were then trying to offer was improper, but regardless of the Court's opinion, it allowed appellants to offer the testimony of their best witness. Certainly this is not a refusal to receive evidence but a direct statement to counsel to offer their best evidence.

Obviously this Honorable Court is left in the dark as to the nature of the evidence sought to be offered on behalf of appellants except as to what may be surmised from the remarks of the trial court, but at best, we submit that this is a very awkward and improper way of attempting to prove a partnership.

The findings of fact, conclusions of law and judgment are before the Court. This Honorable Court in the case of *Rickard v. Thompson*, 72 F. 2d 807 at 809, said:

“By most of the assignments of error it is contended that the court erred in the findings of fact, the claim being made that there was no evidence to sustain some of them and that others are contrary to the evidence, but as appellant has failed to include in the record any of the evidence taken at the trial and the only statement as to evidence is contained in the opinion of the court, which amply sustains the findings and decrees, this court must presume that those findings are correct. *Vineyard Land & Stock Co. v. Twin Falls Oakley L. & W. Co.* (C. C. A. 9), 245 F. 30; *Woods-Faulkner & Co. v. Michelson* (C. C. A. 8), 63 F. (2d) 569; *Karn v. Andresen* (C. C. A. 8), 60 F. (2d) 427.”

Neither will the existence of facts on which the record is silent be presumed for the purposes of reversal.

Collins v. Riley, 104 U. S. 322;

Thompson v. Ferry, 21 S. Ct. 453, 180 U. S. 484;

Avery v. Vernon, et al., 40 F. 2d 796.

We readily admit, in the absence of a full and complete transcript of the record for this Honorable Court to follow, that the trial court did, from time to time during the trial, make certain rulings and sustain certain objections, and overruled certain other objections to questions asked various witnesses by various counsel, but we respectfully submit that this Honorable Court or no other Court could properly determine whether such rulings of the Court were improper unless it had the benefit of the entire record showing the questions to which there may have been objections, the nature and extent of the objections, the subject matter under discussion and possibly the answers to the questions asked. Indeed, the Court should have the benefit of a full and complete transcript of the entire proceeding to properly determine such questions. In the absence of such a record, the Court must conclude that the procedure followed during the course of the trial was in all respects proper.

Counsel, in their opening brief at page 10, cite the case of *Seymour v. Oelrichs*, 115 Cal. 782 at 795-7. We have endeavored to find this case reported in 115 Cal. and do not find such a reported case nor do we find such a numbered page in this volume.

We fail to see how the decision of *Bedell v. Morris*, 63 Cal. App. 453, is of any benefit to appellants, unless they show by the record a similar factual situation.

POINT II RAISED BY APPELLANTS.

The Court Did Not Err in Finding That Appellee, Wilbert C. Hamilton, Is Not Indebted to Petitioning Creditors or Any of Them in Any Amount Whatsoever.

1. Before the Court could determine whether or not Wilbert C. Hamilton was insolvent, it was necessary for the Court to determine from the evidence what debts, if any, he owed.

2. Had the Court determined that Wilbert C. Hamilton was a member of the partnership of Brunson & Bunch, it would still have been necessary for the Court to determine the amount of indebtedness which Hamilton owed before the Court could properly determine the question of insolvency.

See:

Tom v. Sampsell, 131 F. 2d 779.

3. And further, before the trial court could have adjudicated Wilbert C. Hamilton as a bankrupt, either as a partner or personally, it would have been necessary for the Court to find not only that Hamilton was indebted to the petitioning creditors as a partner or personally, but also that the claims of said petitioning creditors were fixed as to liability and liquidated as to amount in order to properly qualify them as petitioning creditors in an involuntary bankruptcy proceeding as required by Section 59-b of the Bankruptcy Act, as amended.

In re Garrett & Co., 134 F. 2d 227;

In re Central Ill. Oil & Refining Co., 133 F. 2d 657.

Counsel for appellants, in their brief, pages 10 and 11, say:

"Throughout the entire trial, the court repeatedly reiterated this position, and continually ruled against

the admission of evidence not specifically directed to the said two points, insolvency and partnership.

“On numerous occasions when appellants attempted to present evidence bearing upon the matters covered by said findings, the respondent objected thereto and in each instance the court sustained objections and refused to admit such evidence.”

Obviously there is nothing in the record to support the last quoted statement of counsel. If it is true, as appellants contend, that on numerous occasions attempts were made to present evidence bearing upon the matters covered by the findings and objections were sustained thereto and appellants were refused the right to offer such evidence, this Court is left in the dark as to the nature of the questions asked, the nature of the evidence offered, and the nature and extent of the objections made. We do not believe this Court will assume the existence of facts on which the record before it is silent for the purposes of supporting a reversal.

The question of whether or not these petitioning creditors had claims fixed as to liability and liquidated as to amount was one of the important issues raised by the pleadings in both the petition and answer.

Further answering appellants' contentions under this point, it makes little difference what the trial court may have said the issues in the trial were at some point or another during the trial, since the trial court later recognized that there were other issues raised by the pleadings before the trial was actually concluded, and counsel had the right and privilege to present evidence upon all the

issues in the case, and had appellants given this Honorable Court the benefit of a full and complete transcript of the trial, such a transcript would have disclosed the fact that counsel had an opportunity to offer evidence upon all issues raised by the pleadings.

The Court, early in the trial, indicated that the case should and would be tried in three days but the fact remains that six days were consumed in the trial and the Court actually continued the case from July 1 to September 7 in order that all evidence upon the issues joined by the pleadings might be received.

It is not uncommon for a trial court, at the beginning of a trial, and before it is too familiar with all the issues of the case, to make certain statements either as to law or evidence from which it later finds it wishes to recede, and it is true that the trial court did recede from its position in the number of days that were to be allocated to the trial of the case and continued the case to September 7 for further hearing, and had counsel favored this Honorable Court with a complete transcript, other changes in the course of the proceedings would have been noted. As a matter of fact, counsel say in appellants' opening brief, on page 25:

“Appellants on several occasions attempted to point this matter out to the trial judge, but were repeatedly overruled, and it was only after appellants' counsel's insistence to an extreme degree that the trial judge acceded in part to appellants' theory of presenting the case.”

POINT III RAISED BY APPELLANTS.

The Court Did Not Direct the Court Reporter Not to Report Certain Remarks of the Court as Complained of by Appellants During the Trial.

Counsel for appellants contend that the remarks complained of made by the Court and which were not taken down by the Court Reporter were made during the trial.

The colloquy here complained of took place after the Court had taken the noon adjournment. Counsel in their opening brief, page 15, say that it happened at about the hour of 12:40 P. M. as shown by the affidavits of Glenn A. Lane, G. N. Williams, H. H. Slate, and George B. McClyman. Mr. Lane says in his affidavit:

“The said Honorable Leon R. Yankwich stated that the court was then adjourning for the usual noon recess; that counsel should prepare themselves for night sessions to try said case, because the Court was scheduled to leave for San Francisco, California, to try other matters,” [Tr. of Record p. 98].

On page 25 of appellants’ opening brief, it is admitted that the Court was not in session at the time of the colloquy, wherein it is said:

“Second, the action of the trial court in arbitrarily limiting the reporter in recording the *actual happenings in open court* shows an attitude on the part of the Court to run the Court for the judge’s own purposes and not for the benefit of litigants.” (Emphasis ours.)

This, we believe, supports our contention that the colloquy took place after the noon adjournment of Court.

Assuming that the Court did tell counsel they would be required to call Mrs. Hamilton as the next witness, the

fact remains that Mrs. Hamilton was not called as the next witness and was not called to testify at all, as shown by her affidavit. [Tr. of Record pp. 113 and 114.] Misconduct of the trial court cannot be determined from isolated statements such as here complained of but rather can only properly be determined from a complete transcript of the record of proceedings had before the trial court.

POINT IV RAISED BY APPELLANTS.

Appellants Were Not Prevented From Having a Fair Trial of the Issues Framed by the Pleadings.

Appellants again contend that they were prevented from offering certain evidence which was material to the issues framed by the pleadings. If this Honorable Court had before it the questions asked or offer of proof, if any, made to which objections were sustained, then this Honorable Court would be in a position to determine whether or not such evidence should have been received. In the absence of such record in the transcript, such contentions merit no consideration.

Under this point, counsel say on page 24 of their opening brief:

“As pointed out in appellants’ Point I herein, the existence of a partnership in which respondent was a partner could be shown only by establishing the fact that respondent was an ostensible partner.”

The Court did not prevent appellants from showing that appellee was an ostensible partner, but on the other hand the Court commented at length even as shown in the limited transcript now before this Court [pp. 135-136-137] upon the very broad nature of the proof to be offered tending to establish a partnership.

Appellee never at any time held himself out to be a partner of Brunson & Bunch and counsel have not cited one bit of evidence tending in any degree to show that he did, and the trial court did not restrict appellants in the introduction of testimony but, on the contrary, indicated that the proof to be offered was of a very broad nature. Counsel's rambling statements are of little force when wholly unsupported by the record which they offer this Honorable Court; and we respectfully submit that this Court is in no position to determine the question of the fairness or unfairness of the trial had by appellants in the absence of a complete record of the proceeding.

We, therefore, respectfully submit that the judgment of the trial court should be affirmed.

SYLVAN Y. ALLEN,

J. D. WILLARD,

ERNEST R. UTLEY,

By ERNEST R. UTLEY,

Attorneys for Appellee.

No. 12183

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE B. McCLYMAN, ELIZABETH SPENCER SAUERS,
ELIZABETH BRAU and WILLIS N. URIE,

Appellants,

vs.

WILBERT C. HAMILTON,

Appellee.

Appellants' Supplemental Brief Submitted in Com-
pliance With Court Order Made on December 8,
1949.

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Appellee.

Appellants' Supplemental Brief Submitted in Compliance With Court Order Made on December 8, 1949.

Statement of Points Treated in the Within Brief.

This supplemental brief is herewith submitted, in compliance with this Court's order made on December 8, 1949, wherein this Court instructed both parties to submit a supplemental brief on the sole point raised at the hearing on said date by appellee, that:

Petitioning creditors herein did not have claims FIXED AS TO LIABILITY and LIQUIDATED AS TO AMOUNT, as to the appellee WILBERT C. HAMILTON.

Supplemental Statement of the Case.

On page two of Appellants' opening brief, it is stated that "A number of persons, in excess of sixty-five, had invested monies in said partnership through the solicitation, personal and by agent, of respondent." These invested monies formed the claims of each of the petitioning creditors. At the trial of the action, there was introduced into evidence written agreements between Appellee Wilbert C. Hamilton on behalf of investors, and the said partnership known as BRUNSON AND BUNCH. In said agreements [Respondents' Exhibits Nos. 32 and 36] it was provided that the said partnership would pay to the said WILLIAMS, as such agent, for the use and benefit of said investors, forty per cent of the profits that were earned by the use of said monies, and that the said partnership indemnified said investors against all losses that might occur.

No denial was ever made by any one that the petitioning creditors had not in fact invested with the said partnership stated amounts of money. Each of the petitioning creditors treated as a partial return of capital all payments made to him by the partnership, and deducted the same from his total investment, in arriving at the amount of his claim.

Argument.

“FIXED AS TO LIABILITY AND LIQUIDATED AS TO AMOUNT” was first incorporated into the Bankruptcy Act by the Act of 1938. This introduced a new concept which a petitioning creditor must hurdle in order to qualify as such in an involuntary petition. This particular phase of the Act has received very little attention from the appellate courts; however, the matter is very extensively treated in Collier on Bankruptcy, 14th Edition, Volume 3, Section 59.14, page 581, *et seq.* The matter received thorough consideration in the case of “In the Matter of Beechwood, District Court of New Jersey, 1940, 36 Fed. Supp. 140.” The petitioning creditor in the *Beechwood* case was a surety on a bond, covering the employee Beechwood. Beechwood converted various sums of money to his own use and the petitioning creditor was called upon by Beechwood’s employer to indemnify under the bond. The argument was made that these amounts could not qualify as liquidated amounts, nor were they fixed as to liability, within the meaning of the phrase, that was imported into the Bankruptcy Act by the Amendment of 1938. The Court had the following to say:

“In support of the contention that this petition is defective because it has not been reduced to judgment, the alleged bankrupt cites the report of the master dismissing creditors’ petition in the case of *In re Fowler*. Therein, the petitioners claimed damages for the anticipatory breach of executory contracts, and the master concluded that Section 59, sub. b. of the Bankruptcy Act, *supra*, intended to exclude all claims whose amounts had not been determined by some sort of adjudication or by agreement between the parties. However, the nature of the claims were obviously not fixed and liquidated.

“Herein, we are only permitted to examine the record before us. The fact that these claims may be flexible and unliquidated are based upon assumptions extrinsic to the record.

“This petition is not distinguishable from one alleging a debt created by reason of goods sold and delivered and services rendered under contract, or the existence of a book account, etc. A tortious quality, indeed, enters into the nature of the claim, because it arises out of the alleged conversion by Beechwood. However, it is not the type of tort that must await juridical award to fix liability and the amount of damages as in the case of an injury to person or property, or the taking of money’s worth. Here the taking is expressed in a fixed amount of money. On a motion to dismiss we cannot take cognizance of the fact that the alleged bankrupt may have defenses to the whole or part of petitioner’s claim. This is a matter that can be determined only after issue is raised by answer. Confined to the petition as we are, we believe that the petitioning creditor has a claim fixed as to liability and liquidated as to amount.”

Appellants submit that there is no distinction in principle between their position as petitioning creditors herein, and the surety as petitioning creditor in the *Beechwood* case. The liability is fixed both under the bond in the *Beechwood* case, and the contracts between the partnership, and the investors, in the within action. They are definite as to amount in both situations because that is definite which may be made definite by computation. A further analogy may be found in the common law action of debt, in that an action of debt will lie where the plaintiff’s claim can be reduced to certainty by arithmetical computation.

In the 1949 Cumulative Supplement to Collier on Bankruptcy, 14th Edition, Volume 3, Section 59.14, at page 51, *et seq.*, there are to be found additional cases on this point. In the *Matter of Garrett and Co.*, C. C. A. 7, 1943, 134 F. 2d 227, we have the situation of an accountant's having rendered services as such, filing as a petitioning creditor, and the court held, correctly so, that he could not qualify because his claim was in doubt as to the reasonable worth of the services and the extent of the services rendered, and it could not be determined whether they were worth in excess of \$500.00.

In the *Matter of Central Illinois Oil and Refining Company*, C. C. A. 7, 1943, 133 F. 2d 657, we have the situation of a secured creditor, having the security of a chattel mortgage for the major portion of the claim, and having several hundred dollars in the form of an unsecured claim. The creditor filed an involuntary petition without mentioning the security and the Court held that inasmuch as he had waived the preferred position as security-holder, by his failure to mention and claim his security, the entire sum would be treated as an unsecured claim, and therefore he would qualify as having a claim liquidated as to amount and fixed as to liability.

In the case of *In re Myers*, 31 Fed. Supp. 636, the Court held that the balance due on a promissory note, although not payable at the time of filing the petition, would qualify as liquidated in amount and fixed as to liability, the court saying (p. 638) that, "the debt seems to be a provable one . . . it is a fixed liability as evidenced by instrument in writing, and it is absolutely owing when the petition was filed, whether then payable or not."

In the case of *Winkleman v. Ogami* (C. C. A. 9, 1941), 123 F. 2d 78, wherein two of the three petitioning creditors had received voidable preferences and had made no offer to return them, Judge Healy said (p. 80): "On its face, the Statute is plain. A creditor who has received a voidable preference may nevertheless prove his claim, although it may not be allowed unless the preference is surrendered or except upon condition that it be surrendered. . . ."

The partnership of BRUNSON & BUNCH, as such, was adjudicated a bankrupt in November of 1947, and by reason thereof, the fact of the petitioning creditors having been investors in the partnership and their investments being fixed as to liability and liquidated as to amount is a closed matter. The adjudication of bankruptcy is now final. The ONLY issues at the trial of this matter was whether WILBERT C. HAMILTON was a partner in the adjudicated bankrupt partnership and if so, whether he was insolvent.

Respectfully submitted,

H. H. SLATE and

GLENN A. LANE,

Attorneys for Petitioning Creditors.

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Appellee.

APPELLEE'S REPLY TO SUPPLEMENTAL
BRIEF.

FILED

JAN 12 1950

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APPELLEE'S REPLY TO SUPPLEMENTAL BRIEF.

Statement.

The facts in this case have heretofore been presented to the Court, and we shall not attempt to repeat them.

Argument.

Appellants, by the admission in the last sentence of their supplemental brief, make an extensive argument upon our part unnecessary. They say:

“The only issues at the trial of this matter was whether Wilbert C. Hamilton was a partner in the adjudicated bankrupt partnership and if so, whether he was insolvent.”

By the above they admit that there was an undetermined issue, and that the issue was whether appellee Hamilton was a partner of Brunson & Bunch.

Hamilton vigorously denied that he was a partner of Brunson & Bunch, or that he was personally liable to the petitioning creditors in any sum whatsoever. Therefore, the liability was not fixed as to him, and since it was not fixed as to appellee, petitioning creditors could not qualify as petitioning creditors under the provisions of Section 59-b of the Bankruptcy Act. Under this section of the Act, a petitioning creditor must not only have a claim which is liquidated as to amount, but it must be fixed as to liability against the person against whom the proceeding is directed.

Conceding, for the sake of argument, without admitting, that petitioning creditors here had claims fixed as to liability and liquidated as to amount against the partnership of Brunson & Bunch, still this would not be sufficient as against Hamilton.

It will be observed that in this bankruptcy proceeding it is sought to have Hamilton adjudicated both as a partner of Brunson & Bunch and individually. Appellants come into a court of bankruptcy and attempt to fix liability as to Hamilton without first having that liability fixed in a proper court action.

1938 Amendment.

Prior to the 1938 amendment of Section 59-b of the Bankruptcy Act, a creditor with a provable claim under Section 63 of the Act could qualify as a petitioning creditor in an involuntary bankruptcy proceeding whether such a claim was liquidated or not. In such proceedings much delay was caused in the determination of such issues (3 Collier on Bankruptcy, 14th Edition, page 583) and as a matter of common knowledge, the bankruptcy courts became congested by reason of the fact that such issues, collateral to the principal issue, had to be determined. This situation resulted in the 1938 amendment to Section 59-b of the Bankruptcy Act requiring the claims of petitioning creditors to be fixed as to liability and liquidated as to amount.

In re Beechwood, 36 Fed. Supp. 140.

Counsel for appellant says:

“Appellants submit that there is no distinction in principle between their position as petitioning creditors herein, and the surety as petitioning creditor in the Beechwood case. The liability is fixed both under the bond in the Beechwood case, and the contracts between the partnership, and the investors, in the within action.”

A careful reading of the *Beechwood* case will disclose that there is a substantial difference.

Beechwood had misappropriated money of his employer. He was under bond, and his bonding company had become liable to Beechwood's employer under said bond. Before filing the involuntary petition in bankruptcy, the bonding company had purchased the claim of Beechwood's em-

ployer, and there was a fixed liability both by reason of the embezzlement and the contractual liability under the bond.

Furthermore, the Court, in the *Beechwood* case, points out that it was passing upon a motion which was in the nature of a demurrer, and where no answer had been filed which raised an issue as to liability or the amount of the claim, and the Court concludes by saying:

“Here the taking is expressed in a fixed amount of money. On a motion to dismiss we cannot take cognizance of the fact that the alleged bankrupt may have defenses to the whole or part of petitioner’s claim. This is a matter that can be determined only after issue is raised by answer. Confined to the petition as we are, we believe the petitioning creditor has a claim fixed as to liability and liquidated as to amount.”

In the case here at issue, Hamilton had filed his answer denying that he was a partner of Brunson & Bunch, or that he was indebted to the petitioning creditors in any sum. Not only that, but the trial court heard evidence upon these issues, and determined them adversely to petitioning creditors. The fact that the claims of petitioning creditors were not fixed as to liability and liquidated as to amount is evidenced by the fact that counsel for appellants announced to this Honorable Court, at the time of oral argument on December 8, 1949, that he had subsequently been attempting to liquidate these claims as against Hamilton in a state court action.

We cited the cases of *In re Garrett & Co.*, 134 F. 2d 227 and *In re Central Ill. Oil & Refining Co.*, 133 F. 2d 657 in our reply brief herein, and further comment thereon is unnecessary.

Findings of Trial Court.

The Trial Court found that Hamilton was not a partner of Brunson & Bunch. [Finding No. 2, p. 78, Transcript of Record.]

The Trial Court found that petitioners were not creditors of Hamilton. [Finding No. 2-d, p. 79, Transcript of Record.]

The Trial Court found that petitioners did not have claims fixed as to liability or liquidated as to amount against Hamilton. [Finding No. 2-o, p. 82, Transcript of Record.]

In the oral argument before this Honorable Court on December 8, 1949, the question arose as to whether or not the last mentioned finding contradicted the finding to the effect that petitioners were not creditors of Hamilton. We have examined these findings quite carefully since said date and do not feel that there is a contradiction. Certainly if the petitioners in the involuntary proceeding were not creditors of Hamilton, then they could not have claims fixed as to liability or liquidated as to amount against him. Under the law, these petitioners not only had to be creditors of Hamilton, but it was necessary for them to have claims against him, fixed as to liability and liquidated as to amount and both the findings in paragraphs 2-d and 2-o were proper and necessary findings.

It is obvious that the petitioners in this involuntary proceeding did not qualify under the provisions of Section 59-b of the Bankruptcy Act.

Respectfully submitted,

SYLVAN Y. ALLEN,

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Attorneys for Appellee.

